REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LV.

ALBANY:
W. C. LITTLE & CO., LAW BOOKSELLERS.
1870.

Rec. Jan. 24, 1872

STEREOTYPED AND PRINTED
BY J. M. DAVISON, SARATOGA SPRINGS.

JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1870.

FIRST JUDICIAL DISTRICT.

CLASS 1. JOSIAH SUTHERLAND.*
" 2. DANIEL P. INGRAHAM.†
" 3. ALBERT CARDOZO.
" 4. GEORGE G. BARNARD.
" 5. JOHN R. BRADY.‡

SECOND JUDICIAL DISTRICT.

" 1. JOSEPH F. BARNARD.†
" 2. JASPER W. GILBERT.
" 3. ABRAHAM B. TAPPEN.
" 4. CALVIN E. PRATT.‡

THIRD JUDICIAL DISTRICT.

" 1. CHARLES R. INGALLS.*
" 2. HENRY HOGEBOOM.†
" 3. RUFUS W. PECKHAM.
" 4. THEODORE MILLER.§

FOURTH JUDICIAL DISTRICT.

" 1. ENOCH H. ROSEKRANS.†
" 2. PLATT POTTER.
" 3. AUGUSTUS BOCKES.
" 4. AMAZIAH B. JAMES.§

FIFTH JUDICIAL DISTRICT.

CLASS 1. HENRY A. FOSTER.*
" 2. JOSEPH MULLIN.†
" 3. LE ROY MORGAN.
" 4. CHARLES H. DOOLITTLE.‡

SIXTH JUDICIAL DISTRICT.

" 1. RANSOM BALCOM.†
" 2. DOUGLASS BOARDMAN.
" 3. JOHN M. PARKER.
" 4. WILLIAM MURRAY, JR.§

SEVENTH JUDICIAL DISTRICT.

" 1. ERASMUS DARWIN SMITH.*
" 2. THOMAS A. JOHNSON.†
" 3. JAMES C. SMITH.
" 4. CHARLES C. DWIGHT.§

EIGHTH JUDICIAL DISTRICT.

" 1. RICHARD P. MARVIN.†
" 2. GEORGE BARKER.
" 3. JOHN L. TALCOTT.‡
" 4. CHARLES DANIELS.§

MARSHALL B. CHAMPLAIN, *Attorney General.*

* Sitting in the Court of Appeals.
† Presiding Justice.
‡ Elected November, 1869.
§ Re-elected November, 1869.

CASES

REPORTED IN THIS VOLUME.

N

P

R

S

T

W

CASES

IN

Law and Equity

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

JAMES RODGERS *vs.* JAMES BONNER and REBECCA his wife, MONTGOMERY PELTON, JARED C. WILLIAMS, Sheriff &c., JOHN CROUSE, JOHN J. CROUSE, DANIEL E. CROUSE and COURTLAND D. HUSTED.

In regard to real estate, it is not necessary that an officer holding an execution, or an attachment, go upon the property; it is not necessary that it should be even within his view. He must undoubtedly do some act; make some entry or memorandum indicative of his intention; but having done that, with such purpose in his mind, although he makes no vocal proclamation of the fact, he has made a legal levy.

A sheriff, having attachments against the defendant's property, went to the house of the defendant, where he resided, with the view of levying the same on the latter's property. He made no proclamation to the defendant that he should seize or levy on the house and lot, upon the attachments, but he did, on the same day, make a pencil memorandum, on a loose piece of paper, of the house and lot, with the intent, as the referee found, to seize the same on the attachments; and early the next morning, the clerk of the sheriff, by his

direction, indorsed upon the attachments a memorandum of the seizure under the attachments, but the same was not then fully completed, or signed by the sheriff until some days thereafter. He subsequently put the house and lot into the inventory of the property seized under the attachments.

Held that the sheriff having entered upon the premises and there performed an act which in view of the intent with which it was done, was unequivocal in its nature, this constituted a valid levy; especially in view of the acts that followed, which referred and related back to the original entry made by the officer, and which, taken together, constituted the one act of a levy, under and by virtue of the attachments.

It is not necessary to the validity of a levy made under an attachment, that the warrant be returned to the officer issuing it.

If there is any statutory provision touching the return of an attachment to the officer issuing it, the statute is merely directory to the officer, and his omission to do his duty cannot be availed of in a collateral action, to defeat the remedy of the plaintiff in the attachment suits.

The omission to file a notice of *lis pendens*, in an attachment suit, until after another creditor has obtained a judgment against the defendant, has no effect to postpone the lien of the attachment to that of the judgment.

Such notice, or the want of it, only affects a subsequent purchaser or incumbrancer whose conveyance or incumbrance is afterwards executed or recorded. As respects a mere judgment creditor, it is never necessary that he should have notice of a prior lien, in order to give it priority.

It is not necessary to a valid execution of an attachment against real estate, that a copy of it should be served on the debtor.

Section 285 of the Code embraces shares of stock, or debts due the judgment debtor, and which are incapable of manual delivery, and not real estate; which is not in any sense within the language or spirit of the section.

APPEAL from a judgment entered upon the report of a referee.

The action was brought for the purpose: (1.) Of having a conveyance by James Bonner, of lot 101 East Fayette street, Syracuse, to his wife, declared fraudulent and void as against the plaintiff's judgments. (2.) Of establishing the priority of the lien of the plaintiff's judgments upon said lot, over attachments issued by the defendants Crouse and others, and for the payment of the proceeds of the sale thereof in the hands of the sheriff, to the plaintiff, to apply on his judgments.

The answer of James Bonner and wife was a general denial of the complaint. The answer of the defendants

Crouse & Co., with whom the sheriff joined, set forth the attachments and alleged a seizure of the real estate thereon on the 26th day of November, 1866, and claimed priority on account of said attachments and the seizure of said real estate thereon before the plaintiff's judgments. They also united with the plaintiff in claiming that the conveyance from Bonner to his wife was fraudulent and void as to his creditors.

The referee found the following facts, viz: That on or about the 25th day of November, 1866, the defendants James Bonner and Montgomery Pelton having been copartners in the grocery business in the city of Syracuse, failed, being largely indebted at the time to numerous individuals, and in fact, insolvent. Prior to that time, and on the 9th day of April, 1864, Robert M. Pelton obtained a judgment against them, to secure advancements and indorsements, to the amount of $4000, which on that day was docketed in the clerk's office of Onondaga county, and became the first lien on the real estate of this defendant in said county, and especially upon the house and lot of James Bonner, which he then owned and occupied in the city of Syracuse, known as No. 101 Fayette street. On the 24th day of November, 1866, a judgment was obtained against James Bonner and John W. Williams, by confession, for $2126.97, and docketed the same day in the clerk's office of Onondaga county. Executions were issued upon both of these judgments to the sheriff of Onondaga county on the 24th day of November, 1866. On the 26th day of November, 1866, the firm of Crouse & Co., consisting of the defendants John Crouse, John J. Crouse, Daniel E. Crouse and Courtland Husted, commenced suits and obtained attachments against the property of Bonner & Pelton and James Bonner, and gave the warrant of attachment to said sheriff of Onondaga county on that day, to be served, and on the 18th day of December, 1866, obtained judgments in said suits, one against

said Bonner & Pelton for $1463.34, and another against James Bonner for $320.71, and both judgments were on that day docketed in the clerk's office of Onondaga county, and executions on the same day issued and delivered to the said sheriff for the collection of said judgments respectively. Notices of *lis pendens* in said attachment suits were filed in the county clerk's office, April 9, 1867. The sheriff, on receipt of the execution in favor of Robert M. Pelton and John W. Williams, November 24, 1866, levied upon the personal property of Bonner & Pelton. On the 26th day of November, 1866, the said sheriff, on the receipt of the attachments in the suits of Crouse & Co. against Bonner & Pelton and James Bonner, levied upon the personal property already seized upon the above execution, and proceeded to the house in question, number 101 Fayette street, where James Bonner and wife resided, to look for the books of account of Bonner & Pelton, which he supposed to be at the house, on which to levy the attachments, but was unable to find them there. He did not inform Jas. Bonner or his wife that he had seized or should seize the said house and lot on the said attachments, but he did in fact on that day make a pencil memorandum on a loose piece of paper, of said house and lot, with the intent thereby to seize the same on said attachments. On the next morning, between the hours of seven and eight in the forenoon, an indorsement was made on the said attachments without the signature of the sheriff, by which it was claimed that he had on the 26th day of November, 1866, seized upon said attachments all the property of said defendants therein. This indorsement was made by a clerk in the office, but was not signed by the sheriff, for the reason that he thought it was not particular enough in mentioning such seizure, and that it ought to mention the real estate.

The sheriff, on the said 27th day of November, proceeded to prepare an inventory of the property seized upon said attachments, and completed the same on the 30th

day of November, 1866; the property so seized having been fully inventoried and appraised on that day, and the appraisal sworn to. This inventory, instead of having been handed to the judge who issued the attachments, was, on the fourth day of December, 1866, filed with the clerk of Onondaga county.

Afterwards, and after asking counsel, the sheriff finished his return on said attachments, and therein stated, among other things, that on the 26th day of November he seized, by reason of said attachments, the house and lot number 101 Fayette street, Syracuse, and signed the said return as thus completed, and dated the same November 27th, 1866.

On the said 27th day of November, 1866, the plaintiff and one William C. Rodgers recovered a judgment against James Bonner and Montgomery Pelton for $2734.27 by confession, and on the same day James Rodgers, the plaintiff herein, recovered a judgment against Bonner & Pelton for $710.65 by confession. Said judgments were docketed in the clerk's office of Onondaga county, at nine o'clock in the forenoon of the same day. Executions were immediately issued on said judgments and delivered to the said sheriff for collection. The sheriff held the executions in favor of Crouse & Co., the execution in favor of James Rodgers, and James and William C. Rodgers, as well as executions in favor of Robert Pelton and John W. Williams, when the personal property was sold, and sufficient personal property was sold to satisfy in part the executions in favor of Pelton and Williams. The executions in favor of James Rodgers and James and William C. Rodgers were, by direction of the plaintiff's attorneys, returned, and were returned *nulla bona*, before the sale of the house and lot, as hereinafter mentioned. And prior to the commencement of this action, William C. Rodgers transferred, sold and released to James Rodgers his interest in said judgments of James and William C. Rodgers against said Bonner & Pelton.

After the judgment of Robert Pelton, and before the recovery of any other judgments, on July 30th, 1866, James Bonner and wife conveyed to one James Gilbert the house and lot in question, and on the same day the said James Gilbert conveyed the same to Rebecca Bonner, the wife of James Bonner. The object of this conveyance was to vest the title of the said house and lot in Rebecca Bonner, the wife of said James Bonner.

On the 28th of May, 1867, the sheriff sold the house and lot on the execution then in his hands, for something over $3000—the said premises being purchased in by the firm of Crouse & Co., except Courtland Husted, who did not join in the purchase, but on the sale, the sheriff satisfied the balance due on the execution in favor of Robert Pelton and John W. Williams, leaving a balance on hand of $1398.22.

The referee stated in his report that it was satisfactorily established before him by evidence produced on behalf of the plaintiff, that the said conveyances were voluntary and without consideration passing between Bonner and wife, and that they were executed with the intent to delay and defraud the creditors of said Bonner. And it was mutually agreed by the attorneys of the respective parties, that the said conveyances should be held fraudulent and void as against the creditors of James Bonner and the creditors of Bonner & Pelton, the said Bonner at the time of said conveyance being in fact insolvent, and unable to pay his debts; but it was agreed that the taxable costs of her attorney should be paid out of the fund, and that the decree setting aside said conveyances might be paid. And that as he was satisfied from the evidence that the sheriff, when he made the memorandum on the 26th day of November, 1866, intended to seize the house and lot in question, and afterwards put the same into the inventory of the property seized under the said attachments, he found as rulings of law that he seized said house and lot

before the lien of the plaintiff's judgment attached, and that the defendants Crouse & Co. were entitled to priority in the payment of their said judgment, over the judgments of the plaintiff; the circumstances attending and following the making of the memorandum, leaving no doubt in the referee's mind that the sheriff made said memorandum for the purpose of seizing and holding said house and lot upon the said attachments. And he decided that the defendants Crouse & Co. were entitled to have their judgment first satisfied out of the balance of the proceeds of the sale of said house and lot; which balance was $1398.42, not sufficient to satisfy the judgments in the attachment suits. And he ordered a judgment setting aside the conveyance from Bonner and wife to Gilbert, and from Gilbert to Bonner's wife, as against creditors, with taxable costs to be paid to Bonner's attorney out of the fund in question, and without costs as between the other parties; declaring the lien of the attachments in question prior, in point of time and right, to the lien of the plaintiff's judgments; and authorizing and requiring the sheriff to pay the surplus in his hands to the defendants Crouse & Co., when demanded.

From the judgment entered upon this report, the plaintiff appealed.

W. & A. B. Porter, for the appellant. I. The lien of the plaintiff's judgment is entitled to a preference over the attachment of Crouse & Co. 1. The proceedings necessary to perfect a lien of the attachments have never been completed, or if completed, were not completed until after the plaintiff's judgments were docketed, November 27, 1866, at 9 o'clock A. M. The statutes (*Code*, § 232, and 2 *R. S. p.* 4, § 8) require that the inventories shall be returned to the officer who issued the warrant. The inventories in this case have never been returned. A failure to *make* an inventory could not be more fatal to the lien of

the attachment than the omission to *return* it. The *making* of the inventory is no more imperatively enjoined by the statute than its *return*, and that a failure to make an inventory would be fatal cannot be denied. (*Drake on Attachments*, 235.) 2. As the real estate in question was not susceptible of *manual* delivery, to constitute a valid levy, a copy of the warrant of attachment, and a notice showing the property levied upon, should have been left by the sheriff with Bonner or his wife, according to section 335 of the Code. This was not done. (*Thompson on Prov. Rem.* 436, § 8. *Brownell* v. *Carnley*, 3 *Duer*, 9.) 3. Notice of *lis pendens* in the actions of Crouse & Co. against Bonner, as provided by section 132 of the Code, were not filed until long after the recording of our judgments. (*Hoffman's Prov. Rem.* 427. *See Voorhee's Code of* 1867, *p.* 423, *note a; Learned* v. *Vandenburgh*, 7 *How.* 379.) The case of *Burkhardt* v. *Sanford*, (7 *How.* 329,) in which the judge, giving the opinion, expresses a different doctrine, was decided before the amendment of section 132, providing for the filing notice of *lis pendens* in cases of attachments. 4. Should it be held that a levy on the real estate in this case could have been made without returning the inventory, then it is evident that no such lien or levy was made until the perfecting the inventories, Nov. 30th, three days after the plaintiff's judgments were entered, (*Burkhardt* v. *McClellan, in Court of Appeals, reported in note*, 15 *Abb. R.* 243,) as that was the only *open, public* or *unequivocal* act of the sheriff, asserting a determination to seize the land. 5. Again; if it should be held that a lien by the attachments could be created short of making and returning the inventories, it must be done by some act constituting a levy or seizure at common law. Such act must consist of an *open, public* and *unequivocal* assertion of claim or dominion over the premises by virtue of the attachments. (*Beekman* v. *Lansing*, 3 *Wend.* 450. *Barker* v. *Binninger*, 14 *N. Y. Rep.* 270. *Price* v. *Shipps*, 16 *Barb.* 585. *Hoff-*

man's Prov. Rem. 428.) The plaintiff should openly claim to seize the land under the attachments. (*Learned* v. *Vandenburgh*, 8 *How.* 78.) Nothing should be done, or omitted, calculated to cast concealment over the transaction. (*Beekman* v. *Lansing*, 3 *Wend.* 450.) Nothing of this kind constituting a levy was done by the sheriff prior to 9 o'clock on the 27th November, at which time our judgments were docketed. Up to that hour, all that was done by the sheriff was on the evening of the 26th November, to go upon the premises in search of Bonner's books, saying nothing to Bonner or his wife upon the subject of seizing the premises on his attachments. Thereafter, on the same day, he made a pencil memorandum on a loose piece of paper, of the house and lot in question, with the intent, as found by the referee, to seize the same. This, it is manifest, falls far short of constituting a levy upon or seizure of the premises in question, within the authorities defining a *levy*. (*a.*) The making of a memorandum on a loose piece of paper, of the property intended to be levied upon, is of itself no act constituting or having a tendency to constitute a levy. (*b.*) The act was not *open*, *public* or *unequivocal*, as required in *Beekman* v. *Lansing*, above cited. (*c.*) The conduct of the sheriff, if he intended this act as a levy, was calculated to "cast concealment over the transaction," as he kept such intention a secret from Bonner and wife, and also previously informed Bonner that the attachments were against his goods and chattels and live stock. It will not be claimed that the partial return indorsed by Goodell on the attachments on the morning of the 27th was any act of the sheriff, as he disaffirmed it. It did not profess to embrace the lot in question, and for that reason was disapproved of by the sheriff. The making of the pencil memorandum seems, therefore, to constitute the only act done by the sheriff towards making a levy under the attachments. When requested to find that this did not constitute a levy or seizure of the land in

question, the referee refused to do so, but immediately proceeds so to find in substance, by finding "that the making of the pencil memorandum of the house and lot with the intent thereby to seize the same on said attachments, and his *subsequent proceedings*, taken together, constituted a levy." As the plaintiff's judgments were docketed before the "subsequent proceedings" were had, and which the referee seems to think were necessary to constitute a levy or seizure, it follows that he must conclude that the attachment became a lien before seizure under them; which is contrary to all authorities.

II. The referee erred in allowing Evans, the under sheriff, to testify as to his intention in making the pencil memorandum on the loose piece of paper. 1. The making of the memorandum, of itself, was no act tending to a *seizure* of the land. Such being the case, the *intention* of the officer cannot change its nature. As well might any other irrelevant act be converted into a levy or seizure by showing the intention of the officer that it should be such. It is an attempt to show a levy by the mere volition of the officer. (8 *How.* 78.) 2. A witness should not be allowed to testify to the secret operations of his mind, with a view to affect the interests of others. The only case where such evidence has been allowed, is that when the *intent* of the witness has been made a material fact by statute; e. g., the intent to defraud creditors by a sale or mortgage of property. It is manifest that this testimony of the witness of his intention swayed the mind of the referee, as he finds that the sheriff made the memorandum with *intent* to seize the lot in question. Were it not for this evidence, the entire *silence* of the sheriff of his intention to make such levy, his declarations to Otis, "that he regarded an attachment a lien upon real estate the same as a judgment, from the time it was issued, and that he had done nothing else in regard to the attachment in question," would lead to

the belief that he did *not* intend the pencil memorandum as a levy

D. Pratt, for the respondents. I. The statute in nowise prescribes the ceremony necessary to be observed in order to make a legal seizure of land under an attachment. It simply prescribes that the sheriff, upon receiving the warrant, shall immediately attach all the real estate of the debtor and all his personal estate, and shall make and return an inventory. (*Code*, § 232. 1 *R. S.* 4, § 728.)

II. What shall constitute a legal seizure of real estate under an attachment, therefore, must depend upon the practice established by the courts. Under that practice it is not necessary that the officer go upon the premises, or even into the vicinity, or do any act, except to make a memorandum of the premises, and in due time make a return of the attachment with an inventory of the property attached. 1. When the inventory is made, it relates back to the time of the levy, and the lien takes effect from that time. 2. The officer having a reasonable time to make the inventory, is not obliged to make a full return before that time; and then it will relate back and take effect as of the time when the first act in the proceedings was performed. (*Greenleaf* v. *Mumford*, 30 *How.* 30.) (*a.*) In *Perrin* v. *Leverett*, (13 *Mass. Rep.* 128,) the officer, in making a levy upon a pew in a church, went to the church door and found it locked. It does not appear that he did anything else. He afterwards returned that he had attached all the right, title, interest, &c., which the court held sufficient. (*b.*) It is manifest in that case that the court did not think it necessary that even a memorandum should be made. 3. It is not necessary that the memorandum or return should describe particularly the premises. (*a.*) In *Crawley* v. *Allen*, (5 *Maine Rep.* 453,) the return by the officer was that he had attached the "right, title and interest of the within named ——, as to real estate in Belfast and Thorn-

dyke;" the defendant held an interest as tenant in common, in some real estate in Belfast; held good. (*b.*) In *Perrin* v. *Leverett*, (*supra,*) the return was "that he had attached all the right, title and interest and estate which the within named had in and to said meeting-house, (meaning thereby to attach the pew No. 82 in said house,) but the doors being closed I could not enter the house." (*c.*) In that case the contest was not whether this return at the time it was made constituted a sufficient levy, but whether the facts stated showed a seizure at a prior time. The strife was between two attaching creditors. The officer in this case went about 4½ P. M. to the door and could not get in. The officer, with second attachment, went at 5 o'clock, entered the church, and made a levy; that was not questioned. The court held the prior levy sufficient. (*d.*) In *Taylor* v. *Mixter*, (11 *Pick.* 341,) the return was that the officer had attached the homestead upon which —— resides, and all land in the town. It was held that the latter clause was sufficient to include a lien upon a twenty-five acre lot not attached to the homestead. (*e.*) In *Learned* v. *Vandenburgh*, (7 *How. Pr.* 379, *aff.* 8 *id.* 78,) the return stated that he had attached all the *real and personal property* of the defendant, which was held sufficient. 4. The return is conclusive, and cannot be questioned collaterally. (*Learned* v. *Vandenburgh, supra. Perrin* v. *Leverett, supra. Evans* v. *Parker*, 20 *Wend.* 622. *Stoors* v. *Kelsey*, 2 *Paige*, 418. *Gra. Pr.* 409.)

III. There was a sufficient levy in this case, made at least as early as eight o'clock in the morning of the 27th day of November, 1866, and before the docketing of the plaintiff's judgments. 1. It will not be contended but that the return of the sheriff upon the warrant, with the inventory, shows a sufficient levy as early as the time above suggested. 2. If the fact of the levy at that time is now open for inquiry, notwithstanding the return and inventory, the proof shows there was amply enough done to consti-

tute a legal levy. (*a.*) The officer, with the warrant of attachment, went to the premises, and with the design of making a levy made a memorandum on paper of the number of the lot. That was much more than was done in the case of *Perrin* v. *Leverett*, (*supra.*) (*b.*) Early next morning he had a more formal levy indorsed upon the warrant, of the fact of having attached the property of the defendant, having at the same time a memorandum of the number of the lot upon a separate piece of paper. (*c.*) The general allegation that he had attached the property of the defendant was sufficient, within the cases cited under point II. (*d.*) But a more particular return was afterwards made and signed by the sheriff, which made it unnecessary to preserve the original memorandum any longer, and which cannot now be questioned in this collateral suit. 3. It is not necessary that the first memorandum should be made upon the writ or warrant. A levy upon personal property is almost uniformly entered in the first place upon a separate piece of paper. (*a.*) Indeed the levy upon personal property is seldom entered or indorsed upon the attachments or executions. (*b.*) The inventory is designed to be the only memorandum describing the property levied upon by an attachment, and if no lien can accrue until the inventory is made, it would, in a great many cases, defeat the whole purpose of an attachment. 4. The sheriff manifestly intended to do all that was necessary to make a legal levy, and it would be very severe upon him to make him liable for the amount of the Crouse judgments, for mere technical omissions, not affecting any substantial right. 5. But it is submitted that there has been no omission of any of the requirements of the statute or the practice of the courts in regard to the levy upon the land.

IV. It is not contended that the effect of a levy under an attachment is not to create a lien upon the property, which would give the Crouse judgments a priority over

the judgments of the plaintiff, provided the levy was sufficient and the other proceedings were legal.

V. There was no irregularity in the proceedings which would destroy the lien created by the levy. 1. As the sheriff is to keep the property, he is not bound to return the warrant, at least until the title should be perfected under the judgment and execution. Then it would be too late to have any effect upon the proceedings, whether he returned it or not. (*Code*, § 242.) 2. The proper place to file the inventory is with the clerk of the court. In that respect the Revised Statutes are changed by the Code. (*a.*) The officer issuing the attachment has nothing to do with the subsequent proceedings. No possible good could therefore be effected by a return to him. (*b.*) The Code provides (§ 232) that he make and return an inventory, and by section 242 he is required, when the warrant shall be fully executed, to return the same with his *proceedings*, to the court in which the action is brought. (*c.*) The inventory is a part of his proceedings. (*d.*) Besides, if the Code designed that the requirements of the Revised Statutes should be followed as to the return, there would have been nothing said in the section about the inventory or return, but the officer would have been left to follow those requirements, under the directions contained in the first clause of the section. (§ 232.) 3. But whether that be so or not, the statute is merely directory, and the lien is not lost by a failure to return to the officer, especially as it would be the duty of the officer to return it to the court. 4. The omission to file the *lis pendens* cannot affect this case. (*Code*, § 172.) (*a.*) The effect of the omission was, that the pendency of the action was only constructive notice to the plaintiff, after the filing of *lis pendens*. (*b.*) But the plaintiff acquired no interest which could be affected by want of notice. (*c.*) If he was a subsequent purchaser or incumbrancer for value, by way of mortgage, value would have been material. But it is never necessary that a judg-

ment creditor should have notice of a prior lien, in order to give it priority.

By the Court, BACON, P. J. The fraudulent character of the conveyance by Bonner to his wife, which it was one of the objects of this suit to set aside, is conceded on all sides, and is so adjudged in the decree. The only struggle here is as to the priority of claim as between the plaintiff and the firm of Crouse & Co., defendants, in respect to the surplus of some $1300 which remained in the sheriff's hands for distribution after the sale; and the sole question to be passed upon is, whether there was a sufficient levy made by the sheriff under the attachments issued in favor of Crouse & Co.

The facts as found by the referee; and about which there is no substantial controversy, are, that on the 26th day of November, 1866, Crouse and others commenced suits, and obtained attachments, against Bonner & Pelton, and Bonner alone. On the same day, in the evening, the officer having the attachments went to the house of Bonner, No. 101 Fayette street, Syracuse, where he resided, with the view of levying the same on Bonner's property. He made no proclamation to Bonner that he should seize or levy on the lot upon the attachments, but he did on that day make a pencil memorandum on a loose piece of paper, of the house and lot, with the intent, as the referee finds, to seize the same on the attachment. On the next morning, before 8 o'clock, the clerk of the sheriff, by his direction, indorsed upon the attachment a memorandum of the seizure under the attachments, but the same was not then fully completed or signed by the sheriff until some days thereafter. On the 27th of November, at the hour of 9 A. M., the plaintiff's judgment was recovered, and duly docketed, and execution forthwith issued thereon. On the 30th of November the proper inventories were made by the sheriff, specifying the lot in question, and these

were not returned to the officer issuing the attachment, but were filed in the office of the county clerk on the 4th December, 1866.

The counsel for the appellant insists, in the first place, that no lien was acquired under the attachments, for the reason that no levy was made by the officer upon the real estate, which can only be done, as he claims, by an open, public and unequivocal seizure of, or an assertion of claim or dominion over, the property by virtue of the attachments. The cases he cites, following the leading case of *Beekman* v. *Lansing*, (3 *Wend.* 446,) are all cases of a levy upon personal property, where the rule requires that the officer should enter upon the premises, and if he does not actually seize and carry away the goods, must have them within his control, and take an inventory—in short, make his acts of such a public and open character that he would be liable as a trespasser, but for the protection of the execution. But no case has gone to any such length in respect to what is necessary to create a lien by virtue of a levy on real estate. In regard to real estate, it is not necessary that an officer holding an execution or an attachment go upon the property; it is not necessary that it should be even within his view. He must undoubtedly do some act, make some entry or memorandum, indicative of his intention; but having done that with such purpose in his mind, although he makes no vocal proclamation of the fact, he has made a legal levy. In *Burkhardt* v. *McClellan*, (15 *Abb.* 243, *note*,) the Court of Appeals held that while an attachment was only a lien from the time of its levy, yet that it was not necessary that the sheriff should actually take possession of the estate levied on. In *Learned* v. *Vandenburgh*, (8 *How.* 77,) Judge Parker states that the mere volition of the officer cannot be the execution of the attachment or the seizure of the property; but that to constitute a levy there must be a seizure, or an exercise of control; or, if the property be real estate, a claim made

to hold it under the attachment. In that case it appeared not only that there was no such claim, but by the inventory and the return to the attachment, there was a disclaimer of a levy as to everything but the personal property, and it was very properly held in that case that no lien was acquired under the attachment.

The case of *Perrin* v. *Leverett* (13 *Mass. Rep.* 128) is a strong authority to show that a levy may be made upon real property not within the sight of the officer, and of course in no respect within his control. It was a contest as to priority between two attachments, both levied upon a pew in a meeting-house. In one case the officer holding an attachment went to the meeting-house at 4 o'clock P. M., the doors being closed, and levied upon pew No. 82, and made return of his levy. In the other the officer, at 5 P. M., went with his attachment, and having procured the key, entered the meeting-house and went into the pew, and there levied on it. The court held the first levy to be good, and that priority of lien was acquired thereby. The court, in giving the opinion, say that "an attachment of real estate upon mesne process is almost entirely symbolical. The tenant is never dispossessed by it. The officer may go upon the land in the dead of the night, attach the land and return his precept, and without any act of notoriety whatever, and indeed with the writ in the officer's pocket until the return day, a lien is created in favor of the attaching creditor. Nay, more; if he never sets foot on the land, but makes a return that he has attached it, there seem to be no means whatever of questioning the fact."

In the light of this case, which shows very clearly what is a levy on real estate, it is evident that the officer holding the attachments of Crouse & Co. did all that was necessary to make a legal levy thereunder. He was not only upon the premises, but he performed an act which, in view of the intent with which it was done, and which

he was properly permitted to testify to, was unequivocal in its nature, and constituted a valid levy. Especially should this so be deemed, in view of the acts which followed, which referred and related back to the original entry made by the officer, and which, taken together, constituted the one act of a levy, under and by virtue of the attachments. The referee having found, as a matter of fact, from the evidence, that when the sheriff made the memorandum of the 26th of November, 1866, he intended to seize the house and lot in question, and afterwards put them into the inventory of the property seized under the attachment, his conclusion of law necessarily and properly follows, that he made the seizure before the lien of the plaintiff's judgment attached, and that consequently the defendants Crouse & Co. were entitled to priority in the payment of their judgment over the judgment of the plaintiff.

Upon the trial the counsel for the defendants offered in evidence the attachments, with the return thereto, to which the plaintiff's counsel objected, on the ground that the attachments had not been returned to the proper court or officer, or filed in the clerk's office. This objection was overruled, and the plaintiff's counsel excepted. The counsel claims that for the reason stated, this evidence was improperly admitted. Is it necessary to the validity of the attachment that it shall be returned to the officer issuing it; and if so, is the plaintiff in this suit entitled to take that objection? By the Revised Statutes (2 *R. S.* 4, § 8, *Edm. ed.*) it is provided that the inventory which is taken by the officer serving the attachment shall, within ten days after the seizure, be returned to the officer who issued the attachment. No provision is made in the Revised Statutes for the return of the attachment itself, either to the officer or the court; but by the 232d section of the Code, the officer is required to make and return an inventory; and the 242d section provides that when the

warrant shall be fully executed and discharged, the sheriff shall return the same with his proceedings thereon, to the court in which the action is brought. This seems to be the only provision touching the return of the attachment, made by law, and this was complied with by the return and filing in this case. But if not, the statute is merely directory to the officer, and his omission to do his duty cannot be availed of, in a collateral action, to defeat the remedy of the party sought in this case. The objection to the attachment on this ground was therefore not well taken.

The omission by the defendants to file notice of the pendency of their suit until after the plaintiff had obtained his judgment, has no effect to postpone the lien of the attachment to that of the judgment. Such notice, or the want of it, only affects a subsequent purchaser or incumbrancer whose conveyance or incumbrance is afterwards executed or recorded. The plaintiff was neither. He was a mere judgment creditor, in respect to whom it is never necessary that he should have notice of a prior lien in order to give it priority. He had acquired no interest in the premises which could be affected by notice, or the want of it.

It was not necessary to a valid execution of the attachment, that a copy of it should be served on the debtor. Section 235 of the Code evidently embraces shares of stock, or debts due the judgment debtor, and which are incapable of manual delivery, and not real estate, which is not in any sense within the language or spirit of the section.

The judgment seems to me to be in all respects right, and should be affirmed.

[ONONDAGA GENERAL TERM, October 5, 1869. *Bacon*, *Foster*, *Mullin* and *Morgan*, Justices.]

HATHORN and others *vs.* THE GERMANIA INSURANCE COMPANY.

Under a condition in a policy of insurance, reserving to the insurers the right to terminate the insurance, at any time, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term, the return of the premium is the essential part of the condition to be performed, and a prerequisite to the right to terminate the risk.

Notice, without a return, or offer to return, the premium, amounts to nothing, Whatever negotiations may take place, until a return or tender of the premium is made, the policy still remains in force.

A promise by the insured to bring the policy to the office of the agent, to be canceled, when he is to receive the return premium, neither amounts to a valid agreement that the policy shall be held and deemed canceled, without a return of the premium, nor to a waiver of performance of the condition on which the right to terminate the risk depends.

Where the agent of the insurers informed the insured that he had been instructed to cancel the policy, under a condition therein reserving the right to do so, telling him that he would give him (the insured) a check for the return premium and cancel the policy the next day, at 12 o'clock, to which the assured assented; but the premium was not paid the next day, nor tendered, nor was any attempt made to cancel the policy, the company retaining the premium, and the insured the policy, until a loss occurred; *Held* that the policy was still in force.

THIS action was brought on a policy of insurance for $5000, issued by the defendants to the plaintiffs, by which the latter were insured on their property, against all loss and damage thereto, by fire, during the period of one year, commencing January 26, 1866. The buildings covered by the policy were wholly destroyed by fire on the 28th of May, of that year. The policy was subject to the following condition, to wit: "The insurance may also be at any time terminated, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

It was insisted, as matter of defense, that the company elected to terminate, and did terminate, the insurance, under the authority of this provision, on the 21st of March preceding the loss.

The action was tried before Justice POTTER, without a jury, and judgment was directed for the plaintiff.

The following opinion was delivered at the special term:

POTTER, J. This action is brought to recover the amount of $5000 and interest, claimed to have been insured by the defendants upon the late Congress Hall building at Saratoga Springs, which was consumed by fire on the 28th day of May, 1866. The policy bore date 3d January, 1865, and was for one year, and it seems was renewed for another year on the 3d January, 1866, by a renewal receipt, in pursuance of a clause in the policy to that effect. The policy and renewal receipt were duly authenticated by the officers of the defendants' company, and contained a clause "that it was not valid unless countersigned by R. McMichael, agent, at Saratoga, N. Y." It was so countersigned. No question arose upon the trial about the making of the contract for insurance, the payment of the premium, the value of the property insured, the agency of McMichael for the defendants, or any misrepresentation or fraud, or breach of condition as to the property insured.

Among the clauses in the policy was the following: "This policy is made and accepted in reference to the terms and conditions herein contained and hereto annexed, which are hereby declared to be a part of this contract;" and one of the annexed conditions was in the following words: "*The insurance may also be at any time terminated at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy.*" On the 13th March, 1866, the president of the defendants, by letter, directed their agent, R. McMichael, to cancel the plaintiffs' policy. This direction was communicated to Mr. Hathorn, one of the plaintiffs. Mr. Hathorn desired the agent to request of the defendants that the policy might be left in force until the

1st April then next. The agent complied with this request. The president of the defendants, in answer, denied this request, but consented to its continuation until the 21st March then instant, at noon. This denial and consent was also communicated by the agent to Mr. Hathorn on or before the 20th of March then instant, perhaps the 18th or 19th, to which Mr. Hathorn replied, "very well." And then, by an understanding then had between McMichael, the agent, and Hathorn, the latter was to call at the office of McMichael the next day with the policy, to receive the check of the agent, McMichael, for the return premium and to have the policy canceled. Hathorn called as agreed, at the time appointed, and the agent not being in, he left, and the parties did not meet again on that day. Thus far the facts are without any material conflict, and will be found as above stated. Subsequent to this date the conversations between the agent of the defendants and Hathorn (if any were had) are conflicting. The agent declaring that Hathorn agreed to call on him and take his check for the premium to be refunded; the latter denying any agreement of the kind, or indeed any conversation, to his recollection.

On the night of the 28th of May, 1866, the Congress Hall property was consumed by fire, without the fault of the plaintiffs. No question is raised as to the value of the property: the loss was total. The preliminary proofs were duly served, though the service was repudiated by the defendants. There was no acceptance of them by the defendants. The action was commenced by the plaintiffs within the required time. The defense resting substantially upon the cancellation of the policy before the time of the fire, and a waiver by the plaintiffs of the actual performance by the repayment of the premium.

The question to be decided is, of course, within a very narrow compass. It is claimed by the defendants that an agreement to determine an insurance, as well as an agree-

ment to insure, may be made by parol; and that the waiver of prepayment of the premium to be refunded, like the waiver of prepayment of the premium in the contract of insurance, may also be by parol. The plaintiffs' contract of insurance was by the written and printed policy issued by the defendants, which provided in itself one, and but one, method by which it could terminate its liabilities, and have its policy canceled and the contract terminated. The contract, as expressed in the policy, of course remained in force until that terminating act was performed according to the terms reserved in the policy so made and issued by the defendants. The burden of proving the performance of this terminating act, was upon the defendants. The *option* of the defendants so to terminate the insurance was duly made known. Of this there is no question. Of the time when the defendants intended it should take effect, the plaintiffs were fully informed. Of *this* there is no dispute. The *place* where the act was to be performed, it is *certain*, was agreed upon between the parties. Hathorn attended at the time and place, according to such agreement, and the defendants' agent was not present; this may be stated as proved. A subsequent agreement by Hathorn to call again at the office of the agent, and bring the policy to be canceled and take the check of the agent for the unexpired premium, though stated by the agent, is expressly denied by Hathorn. In this there is a conflict of evidence.

Unless this fact is maintained by the superior weight of evidence, the question of waiver of payment at the *time*, *as a question of fact*, does not arise. Upon this issue of *fact* the case stands with one witness for the defendants and one witness for the plaintiffs. Assuming this fact to be material, and the witnesses to be equally credible, the defendants have not the necessary preponderance of testimony to sustain this burden. As to the facts from which this *contract to cancel*, and this *waiver* by plaintiffs of pay-

ment at the *time*, is to be made out, the witnesses on both sides concur in this—that after the receipt of the defendant's letter of the 17th of March, 1866, there was to be a future meeting between the defendants' agent and Hathorn; and that at such meeting something further was to be done, to wit, the receiving of the money or check, for the return or unexpired premium, and cancellation of the policy. Such a meeting was never had. I do not mean that the cancellation of the policy was to be a distinct act; the receipt of the returned or unearned premium would doubtless effect a cancellation. Suppose the fact be assumed that Hathorn consented or agreed to meet the agent at his office on the 21st of March, at noon, and take the agent's check for the unexpired premium; and also that he (Hathorn) never gave notice of any intent to revoke that consent or willingness to receive the return premium, but on the contrary continued to intimate or express his assent to do so; would this amount to a legal waiver on his part of the full and actual performance of the condition upon which the cancellation was to take effect? It is undisputed that the defendants never did refund the unearned premium, nor tender it to the plaintiffs. It is undisputed that the defendants kept the premium, and the plaintiffs the policy, and that as a matter of *fact* the cancellation was not accomplished. The way provided by the defendants for terminating the policy at their option was by an act to be performed by themselves. They had not performed that act. In the absence of an express agreement by the plaintiffs to waive the performance of the condition mentioned in the condition of the policy, are the undisputed facts stated sufficient to establish a waiver by implication? If not, then the contract in the meantime continued in force. The *intention* to perform an act, is not equivalent to actual performance. The consent of the plaintiffs that the act of cancellation might be done, was not a new agreement; or, if it was, it had no new consid-

eration to support it. That consent or agreement was given when the contract by the policy was originally made. It was a part of the original contract for insurance, for which a consideration was paid, and received, and not a new agreement. The old agreement remained in force; it was not abandoned for the new one. There were not then two agreements in force; the old one by the policy, the new one by parol. It is a better construction to hold, that the assent of the plaintiffs to the cancellation was rather a consenting or submitting to what they had no power to resist or refuse, when the defendants chose to enforce the condition by refunding the unearned premium, and terminating their liability. There was no benefit to result to the plaintiffs by the act to be performed; on the contrary they regarded it as a favor, if not a benefit, to leave the contract undetermined. They desired its continuance. They applied to the defendants to have it remain undetermined. This favor was denied by the defendants, except for a few days. The defendants insisted upon making their option to cancel the policy according to its letter, by doing the particular act in the particular way provided in the policy. They had the legal and technical right so to do. The plaintiffs possessed no power to prevent it. When Hathorn was informed by the defendants' agent that this option to cancel would be enforced, Hathorn replied, "very well—all right." Is this remark to be held to be an agreement—a *new* agreement on his part—or as an expression of acquiesence in the terms of the original agreement, and in the performance of an act that he could not approve? It was "all right" in law, and by the terms of his policy did he by this remark intend to waive the performance by the defendant, of the act to be done that would put an end to the contract. He doubtless intended to consent to accept the check of the agent in lieu of money, and may well be regarded as having waived the payment of money by consenting to take a

check. But did he waive or intend to waive payment in some form. He was not bound, it was not his duty, to call upon the agent, though by mutual agreement and by proper courtesy between neighbors, he did call upon the agent. We have already said the burden of proof of performance of this condition was upon the defendants. Though the defendants intended to put an end to the agreement, and gave notice of this intent, yet this alone was not sufficient; nor is it sufficient that the plaintiffs consented it might be done, if that consent was but the yielding to an act he knew he could not approve. I cannot see in this a new agreement, or an intent to waive the conditions of the old one. I think, therefore, that there was no legal performance of this condition by the defendants, nor any legal waiver, or waiver in fact of its performance by the plaintiffs. He may have been willing to delay, but at whose risk was the delay? The contract was never *actually* terminated by the option of the defendants, being carried out by the act required in terms in the condition of the policy. This delay could not be at the option of the plaintiffs; it was at the risk of the defendants. If I am right in this, the plaintiffs are entitled to recover the amount insured by the defendants. (*See Franklin Fire Ins. Co.* v. *Massey*, 33 *Penn. R.* 221, 232; *Goit* v. *National Prot. Ins. Co.*, 25 *Barb.* 193; *Head* v. *Providence Ins. Co.*, 2 *Cranch*, 127.)

From the judgment entered in pursuance of the above opinion, the defendants appealed to the general term.

W. A. Beach, for the appellant. Upon the principal question involved, the case is presented in two aspects: *First.* Upon the condition authorizing the company, arbitrarily, to terminate the risk, on refunding the proper proportion of the prepaid premium; *Second.* Upon the undenied parol agreement between the parties, that the risk should end on the 21st of March, 1866.

I. The defendant regularly exerted its power to end the risk. 1. It must be assumed that each party knew the terms and legal effect of the condition conferring the power. 2. The letter of March 13th was an unequivocal exertion of it. That letter was exhibited to the plaintiff, who acquiesced in its demand, but proposed an extension, for his own convenience. 3. At the termination of the extended time, it was agreed that the policy should terminate, and the plaintiff was to call upon the agent and receive his premium. 4. This accomplished the cancellation. It was not indispensably necessary that the unearned premium should be *actually returned.* It was perfectly competent for the plaintiff to *waive* payment. This doctrine of waiver has been very extensively and righteously applied to this class of cases. Prepayment of premium is commonly required, by express condition, and yet it is held that an agent may waive it, and extend credit. And so in a great variety of examples; all of which are precisely parallel to this, in principle. The defendant had the right to cancel this policy, on refunding the premium. It exerted the right without the payment, but the plaintiff agreed that it might so be done. He did not insist upon the immediate return of the premium; at the same time assenting that the policy should be deemed canceled. No formality was necessary to accomplish that. No written cancellation was requisite. By the condition, *notice* was all that was required, accompanied by return of the premium. Certainly it was in the power of the plaintiff to accept the notice as effectual, and waive, or postpone, the immediate repayment of the premium. This was unquestionably done, assuming the plaintiff's relation of the transaction to be correct. True, (as the plaintiff says,) the agent said to him, "I'll give you a check, and cancel it to-morrow, at 12 o'clock." But the agent had previously given the required notice, to which the plaintiff had answered, "very well—all right." It cannot be

denied that there was an acceptance of the notice, and acquiescence in its effect, without insisting upon the condition of payment. Nor can it be denied that both parties considered the policy canceled. The plaintiff knew the positive instructions given by the defendant to its agent. He accepted them as decisive—acquiesced in the result—and then arranges with the agent for a return of the premium at a future day. Is there any doubt that upon these facts the plaintiff could have maintained an action for the unreturned premium? And if so, the policy was at an end. (*Sheldon* v. *Atlantic Fire and M. Ins. Co.*, 26 *N. Y. Rep.* 460.) The supplemental finding, as matter of fact, that there was no waiver, is ineffectual to change the aspect of the case. The facts still remain the same, and this conclusion of the court is but an erroneous inference from them.

II. The other aspect of the case is, however, decisive. The defendant, being entitled to cancel the policy, proceeds to exercise the right. The plaintiff, acceding to the right, interrupts its exercise, by proposing to the defendant, for his own advantage, a continuation of the policy to a named day; and the parties agree that it shall be deemed to continue to that period, and no longer. This is a perfect, legal contract, founded upon abundant consideration, and obligatory upon both parties. 1. It is no objection that it was verbal. Insurance may be by parol; and so may the renewal of a policy, which is a mere extension. And whenever a contract may be made by parol, it may be rescinded or modified in like manner. (*Trustees &c.* v. *Brooklyn Fire Ins. Co.*, 19 *N. Y. Rep.* 305; *S. C.* 28 *id.* 153. *Clark* v. *Dales*, 20 *Barb.* 42, 64. *Kelly* v. *Commonwealth Ins. Co.*, 10 *Bosw.* 82.) 2. There was ample consideration for the contract. (*a.*) In the agreement of the defendant to waive its right of immediate cancellation, which it had commenced to assert. (*b.*) In the new agreement to continue the risk, for a definite period. It was the case of

parties to a contract, under changed circumstances, entering into new stipulations concerning the same subject matter. The last supersedes the first, and finds, in itself, abundant support. It was perfectly competent for the parties to change the limit of this insurance. Mutual concurrence in the change was all that was necessary. And in that mutuality, ample consideration was furnished. (*c.*) In the undertaking, through its agent, on the part of the defendant, to return the unearned premium. Suppose this example: A. sells B. a horse, for $50, reserving the right to reclaim the animal on repaying an agreed proportion of the price. Afterwards A. notifies B. that he elects to exercise that right; and B. proposes an alternative which A. accepts, and so the parties agree. Can the obligation of that contract be questioned? Can it be denied that the first is modified, or rescinded, according to the terms of the latter? Especially would there be any doubt if, in the example supposed, it was made a part of the last arrangement that the purchase price of the horse should be divided between the parties, in a fixed proportion? The finding of the court that there was no waiver in fact does not affect this point, which rests upon the idea of *contract*, not *waiver*.

III. These views are not shaken by the idea that there was a special time appointed, when the premium was to be adjusted, and the policy canceled. 1. Such is not the fact, under the evidence. Only two witnesses speak upon the subject; while agreeing that the policy was to terminate March 21st, they disagree as to the time when payment of the return premium was to be made. 2. But if that was to have been done at 12 o'clock, on the 21st of March, as Mr. Hathorn insists, it would not affect the conclusion. That was not made a condition influencing the continuance of the risk. Its termination at the period designated was definitely fixed, by the concurrent assent of the parties. That time was given, to calculate, and to

pay the unearned premium, did not suspend the operation of the agreement, concluded as to all its terms, and mutually understood to be effective. Assume that Mr. Hathorn called at the agent's hotel, as he says was agreed, to receive his premium, and that the agent broke his appointment; still Mr. Hathorn did not, ever, demand the premium. Although the agent was absent, his clerk, who acted for him in his insurance business, was there. And the calculation of the amount of premium to be returned had been made. The conduct of Mr. Hathorn operated as a waiver and extension of the time of payment. 3. The question of payment is, however, entirely distinct from the life of the policy. It was agreed that it should end on the 21st. Payment was to be made after the agreement. Mr. Hathorn waived strict performance of the condition, according to his own narration, and, according to the agent's, ten days afterwards he recognized the efficacy of the contract. 4. One circumstance is significant, in the consideration of the proofs. Mr. Hathorn more than intimates that on the 19th or 20th of March, when the final instructions from the defendant were exhibited to him, the return of the premium was delayed because it was not calculated, and the agent's book was mislaid; while it is unquestionable that the amount had been computed, at the interview on the 19th or 20th of March. Nothing, therefore, remained but the production of the policy; and that was unnecessary. It would seem impossible to resist the conviction that it was fully understood by the parties that the risk ended on the 21st of March, and that the return of the unearned premium was postponed because the parties supposed a redelivery of the policy necessary, and deferred the return of the premium until Mr. Hathorn should produce it. Consider Mr. Hathorn's relation of the transaction: "Mr. McMichael came to him, saying the defendant had instructed him to cancel this policy. I asked him *to let it run until the first of April.* He said, I will write

and see. He did so, and presented me the reply of the company, as I admit, saying it would give me until the 21st at noon, and no longer, and I agreed to that, saying, very well—all right." Is not this a complete agreement? And what matters it that Mr. Hathorn adds that Mr. McMichael "figured a little, and could not find his book, and proposed a meeting for the next day?" Mr. Hathorn is mistaken in the language he attributes to the agent. The latter could not have said that his instructions were "to cancel that to-morrow, at 12 o'clock." Mr. McMichael swears that he read the letter of March 17, to Hathorn, and the latter does not deny it. The letter was an answer to his request to continue the policy, and consented to a limited continuance. The direction to cancel, and the notice of cancellation, had been given before. All the after negotiation was directed towards an extension of the risk, for Hathorn's accommodation. And it resulted in a specific agreement that it should extend to, and terminate on, the 21st of March, at noon. Hathorn accepted that modification of the policy. It was an agreement, wholly irrespective of the condition for cancellation, and of the return of the premium. The defendant agreed to waive the proceedings to cancel, and to extend to March 21st, and the plaintiff agreed that the policy should be so modified and restricted. If the contract can be set aside, and flagrant injustice practised, against the clear intent of the parties, it must be by a strange and unjustifiable perversion of the evidence. Whatever difficulty may be supposed to exist is wholly produced by confounding the proceeding to cancel the policy with the independent agreement for its modification. That rests exclusively upon the letter of March 15, written with the assent of the plaintiff and by reason of his solicitation, and the reply of March 17, read and submitted to the plaintiff, and assented to by him. The letters, with the parol assent of the plaintiff, constitute the contract, and are the best evidence of it.

C. S. Lester, for the respondents. The only question arising in this case is: Had the contract of insurance been terminated before the fire? This is a question of fact, and the finding of the court below is conclusive upon this question. If, however, it is claimed to be a question of law, arising upon an undisputed state of facts, then the facts as stated in the case most favorably for the plaintiffs are, after a general report in their favor, to be taken for the purpose of determining the law. These facts are as follows: The defendants issued a policy of insurance to the plaintiffs, containing the following condition: "The insurance may also be terminated at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." It will be observed that by the terms of this condition two things are requisite to terminate the insurance. First. *Notice* of the option of the company. Second. *Refunding* a ratable proportion of the premium. The evidence tends to show that the company instructed their agent to terminate the policy on the 21st day of March, 1866. What the agent did towards carrying into effect these instructions is testified to by Mr. Hathorn, as follows: "As I went into the door, walking along up to the stove, he says, 'See here, Hathorn.' I walked up to the desk; he pulled out a letter and said, 'I have got a letter from the Germania Fire Insurance Company, and they direct me to cancel that to-morrow, at twelve o'clock.' I said, 'very well—all right;' he then went and figured a little at the desk, and said, 'I will give you a check, and cancel it to-morrow at twelve o'clock;' said I, 'very well—all right."

Q. The figuring, what did you understand that to be?

A. The figuring I supposed was the amount of premium to be returned, but he did not find the date of the policy that he issued; he did not say that.

Q. By plaintiffs' counsel. That is your supposition?

A. Yes, sir.

Hathorn also testifies that he took the policy and went to the agent's office the next day to carry out the arrangement, but the agent was not there, and nothing further was done in regard to the matter. Now, admitting that this was notice of the option of the company to terminate the policy, it must also be admitted that here there was no refunding of a ratable proportion of the premium.

The defendants admit that the premium was not refunded, as required by the condition of the policy, but claim that payment was waived by the plaintiffs.

I. The question of waiver is a question of fact, and is found against the defendants.

II. The evidence does not authorize the conclusion that the plaintiffs waived, or intended to waive, the repayment of the premium. The most that can be said is that they consented to take the check of McMichael as money.

There was no surrender of the policy at that time. Hathorn did not say, in words or substance, "I agree now that the policy shall be considered canceled." He simply says to McMichael's proposition that they *would* cancel the policy the next day by refunding the premium, "very well—all right." Clearly this is no waiver. (*Wood* v. *Poughkeepsie Mut. Ins. Co.*, 32 *N. Y. Rep.* 619. By the very terms of the arrangement, something further was to be done to consummate it. (*a.*) The amount of return premium was to be ascertained. (*b.*) The check of McMichael was to be given to the plaintiffs for that amount, when ascertained. (*c.*) The policy was to be surrendered and canceled. Until these essential prerequisites were performed, the policy remained in force. If the defendants desired to avail themselves of the right reserved to terminate the contract, then it was the duty of the defendants to see that everything necessary was done to complete it. The delay was wholly at the risk of the defendants. The

plaintiffs had signified their desire to have the policy continue, and there was no duty imposed on the plaintiffs in this respect. The whole interview is simply the declaration on the part of the defendants of an intention to avail themselves, the next day, of the right reserved to cancel the contract. The plaintiff says, "very well—all right," which was simply an assent to the defendants' doing an act which the plaintiffs had neither the power nor the right to prevent, although they desired to do so. The defendants never carried their expressed intention into effect, and the policy remained in force.

III. The burden of proof is on the defendants, and they have failed to show that the contract of insurance was in anywise canceled or rescinded, or any right waived by the plaintiffs.

By the Court, Bockes, J. It is unquestioned that the policy of insurance was in force prior to and until the 21st March, 1866, but it is insisted that the insurance was terminated by the defendants on that day, pursuant to the right to do so reserved by the condition annexed to the policy, and above set out. There had been conversations between the agent of the defendants and Mr. Hathorn, one of the plaintiffs, prior to the 20th March, in regard to the cancellation of the policy, in which Mr. Hathorn had been informed that it was the intention of the company to terminate the insurance. On that day the agent, having received directions from the company to act under the condition and cancel the policy, informed Mr. Hathorn of his instructions, and said to the latter, as stated in the finding of the judge on the trial, that he would give him a check for the return premium, and cancel the policy the next day at 12 o'clock. Mr. Hathorn replied, "very well—all right." The premium was not returned the next day, (21st,) nor tendered, nor was any attempt made to cancel the policy; but the company

retained the premium, and the plaintiffs the policy, until the loss occurred.

Concede the above to be the entire transaction between the parties in regard to the cancellation of the policy, and the defendants' claim that they terminated the risk, pursuant to the condition, is very manifestly without foundation. According to the condition, it was at the option of the company to terminate the insurance, on giving notice to that effect, and *refunding a ratable proportion of the premium for the unexpired term.* The return of the unearned premium was the essential part of the condition to be performed. This was a prerequisite to the right to terminate the risk. Notice, without return or an offer to return the premium, would amount to nothing. The policy would remain in force until a return or tender of the premium was made.

It is urged that Mr. Hathorn promised the agent to bring the policy to the office, to be canceled, when he was to receive the return premium, and the agent so testified, in substance. Were this undisputed, it neither amounted to a valid agreement that the policy should be held and deemed canceled, without a return of the premium, nor a waiver of performance of the condition on which the right to terminate the risk depended. But in answer to this statement of the agent, Mr. Hathorn testified that on the evening of the 20th March the agent informed him that he had received a letter from the company, directing him to cancel the policy the next day. Hathorn replied, "very well—all right." The agent then said, "I will give you a check, and cancel it to-morrow at 12 o'clock." Hathorn again replied, "very well—all right." That the next day, at 12 o'clock, he went to the office with the policy; that the agent was absent; and from that time to the time of the loss, the policy remained in his pocket; during all which time he was ready to receive the unexpired premium, which, however, was never offered him; that in no

other way than as he had stated, did the agent ever request him, or did he promise, to return the policy and close up the matter. Now, according to this evidence, there was no agreement made to terminate the risk. Indeed, none was necessary; nor did the parties suppose it necessary to make a new contract in that regard, inasmuch as the right to terminate the insurance was already secured to the company, on compliance with the condition accompanying the policy itself.

Nor was there any waiver by Mr. Hathorn of the condition. When informed by the agent of the company that he would cancel the policy and return the unearned premium the following day, Mr. Hathorn merely replied, "very well—all right." Instead of remaining gruffly silent, he politely answered, in substance, "as you choose." He had nothing to do, unless indeed he then, as a matter of courtesy, promised to bring the policy to the office to be canceled; and if he did so promise, according to his own testimony he fulfilled it.

Perhaps it should be remarked, that in so far as there is any conflict between the agent and Mr. Hathorn, it is settled by the finding of the learned judge who tried the cause. He finds against the defendants, on the question of waiver. But I do not observe any very serious conflict in the statements of the agent and Mr. Hathorn. They give the transaction substantially alike.

The judgment awarded at special term seems well warranted, in fact and law.

Some exceptions were taken to the admission and rejection of evidence, but none of them are of sufficient importance, as we think, to demand particular comment.

Judgment affirmed, with costs.

[SARATOGA GENERAL TERM, November 1, 1869. *Rosekrans*, *Potter* and *Bockes*, Justices.]

CHILDS *vs.* SMITH.

By an agreement between the parties, for the sale and purchase of land, the sum of $2000, a part of the purchase money, was to become due from the defendant to the plaintiff when a brick and peat company, which the parties proposed to form, should be organized. And when said company should be organized, the plaintiff was to take one-fourth of the stock (over and above the working capital and the one-fourth that was to be received in part payment for the farm) and to pay the defendant, therefor, the sum of $5000.

Held, 1. That these two sums of money, viz., $2000 from the defendant to the plaintiff, and $5000 from the plaintiff to the defendant, becoming due at the same identical period of time, the defendant could not be, at that moment, legally indebted to the plaintiff, but the reverse.

2. That there was nothing, in a finding of fact by the referee that the plaintiff's portion of the stock, and the payment of $5000 therefor, were assumed by a third person, that released the plaintiff from his liability to the defendant; in the absence of any finding that the defendant agreed to any release of the plaintiff, or to any change of the plaintiff's liability to him. That the only legal inference that could or might be drawn, was that the defendant consented that such third person should own the stock if he paid for it and discharged the plaintiff's liability to pay.

3. That if the company contemplated by the agreement was organized, then the defendant was not, on that day, indebted to the plaintiff; the sum due from him being less than that owed by the plaintiff; and if the corporation had not been, and was not formed, before the commencement of the action, then the period of the defendant's indebtedness had not arrived.

4. That the meaning and intent of the parties was, that by the organizing, or forming, the corporation which they were to create, the contingency would arise, or the condition would be performed, upon which the $2000 would become due. And that if, by a failure to organize the company, the time for paying that sum had not arrived, the plaintiff could not recover it; especially where it did not appear that he had even put the defendant in default by a demand, and a refusal, to perfect the organization.

5. That the agreement of the defendant to pay the $2000 being conditional, viz., to pay when the corporation therein mentioned should be organized, the plaintiff could recover only by showing that such condition had been performed by an organization of the company in the manner directed by the statute.

When a statute which grants power or authority has expressly fixed, limited or declared the time when such authority shall begin to be exercised, all other time is excluded. *Expressio unius est exclusio alterius.*

Under the general act authorizing the formation of corporations for manufacturing, mining or mechanical purposes, (*Laws of* 1848, *ch.* 40,) which requires a certificate to be filed in the county clerk's office, and in the office of the Secretary of State, stating the name of the corporation to be formed, and the

nature of its business, &c., and declares that "*when* such certificate shall have been filed," the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, &c., it is essential that such a certificate shall be filed in the offices specified. Until that is done, no corporation can be formed.

However necessary or convenient a meeting of the persons intending to constitute themselves a corporation, the adoption of resolutions or by-laws, choice of officers, or any other proceedings may be, in securing a due organization, and to bind the action of its members to that object, whether performed before or after their incorporation, they are of themselves no part of the statutory requirement; and they confer no corporate power—no legal right to act as a corporation.

Such acts of the parties, without even an act of user, do not create either a corporation *de facto*, or a corporation *de jure*, as between the parties themselves.

Where each of the parties to an agreement had a claim, under it, against the other, contingent, or conditioned to become due, upon the formation of a corporation; *Held* that this meant a *legal* corporation; and that each party was presumed to know what requisites the law demanded, in order to create a corporation.

APPEAL from a judgment entered upon the report of a referee. The action was to recover $3000, part of the consideration of a farm conveyed to the defendant, in the town of Saratoga Springs. The defendant sets up in his defense, among other things, that the farm in question was conveyed upon certain conditions, and to be paid for in the manner and according to the agreement set up in the answer, and not otherwise; and that the conditions upon which the payment was to be made have never been performed; and also that the sum mentioned to be paid was conditional, depending upon an agreement on the part of the plaintiff, which has never been performed. The action was referred to a sole referee, who reported in favor of the plaintiff, and directed judgment for $2253.91, with costs. From this judgment the defendant appealed. The facts found by the referee, and his conclusions of law, are as follows:

First. That on the 18th day of April, 1867, the plaintiff was the owner of a farm of about 150 acres, situate on

Union avenue, about two miles east of Saratoga Springs, in the county of Saratoga.

Second. That said farm was then incumbered by two mortgages, amounting in the whole, including interest to that date, to the sum of $10,000.

Third. That about 50 acres of said farm was muck and clay land, which the parties to this action then supposed was valuable for the purpose of manufacturing brick and peat therefrom.

Fourth. That on the said 18th day of April, 1867, the said plaintiff sold and conveyed to the defendant the above mentioned farm, excepting about four acres therefrom. That the same was conveyed subject to the said two mortgages.

Fifth. That the agreement between the said parties, and under which the conveyance was made, was in substance as follows: The plaintiff to sell the said farm of 150 acres to the defendant for the price or sum of $20,000, to be paid by the defendant as follows: the defendant to assume and pay the two mortgages for $10,000; two thousand dollars to be deducted or allowed for the four acres reserved by the plaintiff; the plaintiff to have one-fourth or a one-fourth interest in the above mentioned fifty acres of clay and peat land, for which he was to allow $5000 on said purchase price, and the remaining sum of $3000 to be paid by the defendant to the plaintiff, in cash, as follows: $1000 at or within a few days from the time of delivering the deed, and the remaining sum of $2000 when the brick and peat company (which the said parties then proposed to form) should be organized. The said parties to form a company upon the said fifty acres of clay and peat land, with a capital of $150,000; the company to reserve $70,000 of the stock for working capital; the remainder of the stock to be divided as follows: one-fourth part, $20,000, to belong to the plaintiff; one-half, $40,000, to belong to the defendant; and the other one-fourth part, $20,000,

when the company was organized, the plaintiff was to take and pay the defendant therefor the sum of $5000; the plaintiff stating to the defendant, at the time, that he believed that if the interest was paid on the said two mortgages, which would be due about the first of July then next, the mortgages could remain, and he, the plaintiff, would see the mortgagees and endeavor to have them remain if such interest was paid; but there was no agreement by the plaintiff to procure any extension of said mortgages, or either of them.

Sixth. That upon the delivery of said deed, and on the said 18th day of April, 1867, the defendant took possession of the said farm and leased the same for farm purposes, reserving the right to use the said fifty acres of clay and peat lands for the purpose of developing the same.

Seventh. That upon receiving the said deed, or soon thereafter, the defendant made and delivered to the plaintiff his promissory note, payable at bank, for $300; and on or about the 16th day of August, 1867, the defendant delivered to the plaintiff two acceptances for $350 each, one due in sixty days from date, and the other in ninety days from date—thus making the $1000 that was to be paid by the defendant to the plaintiff on the delivery of said deed.

Eighth. That immediately after the said deed was delivered to the defendant by the plaintiff, the plaintiff, defendant and one William B. Laithe, executed and acknowledged articles of incorporation (under the statute of the State of New York in relation to the formation of corporations for manufacturing, mechanical and chemical purposes) for the purpose of organizing a brick and peat company on the said fifty acres of clay and peat land, as contemplated by said agreement. That such articles of incorporation were drawn up by the defendant, bearing date April 29, 1867, and were duly acknowledged before the proper officer on the 3d day of May, 1867. That the

amount of capital stock of said company, mentioned in said articles, was one hundred and fifty thousand dollars.

Ninth. That upon signing said articles of incorporation, and on the 30th day of April, 1867, the said plaintiff, defendant and Wm. B. Laithe, assumed to act as a corporation, and met as such, electing officers and making provision for procuring or perfecting the title in the said fifty acres to the company; and at such meeting the defendant was elected president of said company, the plaintiff was elected vice-president, and the said William B. Laithe was elected secretary and treasurer; and the defendant proposed rules and by-laws for the government of said corporation, which were adopted, and with the certificate of incorporation and other proceedings, were entered by direction of the defendant in a book procured and used as the record-book of said corporation. Action was also taken at said meeting in relation to completing the grounds and yards on said fifty acres, and procuring machines for the purpose of manufacturing as soon as the company should decide what machine they would use for that purpose.

Tenth. The said articles of incorporation were never filed in the Secretary of State's office, neither was a copy or duplicate made and filed in the clerk's office of the county of Saratoga; but the same, by the direction of the defendant, were delivered to William B. Laithe to be filed in the Secretary of State's office.

Eleventh. The defendant neglected to pay the interest on said two mortgages, when the same became due, in July, 1867, and the said mortgages were foreclosed by a sale of the mortgaged premises, and were purchased under said sale by John C. Hulbert, Esq., of Saratoga Springs, who is now the owner thereof. That said sale embraces the said fifty acres of clay and peat land. The foreclosure was commenced soon after the 1st of July, 1867, and the premises were sold in the fall of 1867.

Twelfth. That after the foreclosure and sale of said premises under said mortgages, nothing more was done in relation to the organization of said corporation, and the same was abandoned.

Thirteenth. That the said defendant, Smith, has not paid to the plaintiff the said sum of $2000, or any part thereof.

Fourteenth. That the $20,000 of stock which by said agreement was to be taken by the plaintiff, and $5000 thereof paid, was by the arrangement of the parties assumed and taken by the said William B. Laithe.

Fifteenth. That the brick and peat company, as proposed to be formed by the parties hereto, was formed as between them and the said Laithe, and as regards third persons, and the same became and was a corporation *de facto*, and was so formed as between the parties thereto; that the contingency upon which the said $2000 was to become payable, had happened before the commencement of this action.

The referee found, as conclusions of law, that the defendant was indebted to the plaintiff in this action, in the sum of $2000, with interest thereon from the first day of July, 1867, amounting in the whole to the sum of $2253.91. That the same was due, and was due at the time of the commencement of this action. He therefore directed judgment to be entered in favor of the plaintiff and against the defendant for the sum of $2253.91, together with costs and disbursements to be adjusted.

J. C. Hulbert, for the plaintiff.

J. A. Shoudy, for the defendant.

POTTER, J.: If the learned referee has correctly found the facts in this case, I find myself entirely unable to sustain his conclusion of law, that the defendant is indebted to the plaintiff in the sum of $2000, with interest from the

first day of July, 1867. He finds that by an oral agreement between the parties, this sum of $2000 was to become due from the defendant to the plaintiff when "the brick and peat company," which the parties then (in April, 1867) proposed to form, should be organized; and, in the same paragraph, he also finds that when the company (was) should be organized the plaintiff was to take one-fourth of the stock, (over and above the working capital, and over and above the fourth that was to be received in part payment of the farm,) and to pay the defendant therefor the sum of $5000. By this finding, these two sums of money, to wit; $2000 from the defendant to the plaintiff, and $5000 from the plaintiff to the defendant, became due at the same identical period of time. It is the simplest logic that proves the proposition that if, at a given period, the defendant became liable to pay the plaintiff the sum of $2000, and the plaintiff to pay the defendant $5000, the latter could not be, at that moment, legally indebted to the former, but the reverse. There is nothing in the fourteenth finding of fact, that the plaintiff's portion of stock, and the money to be paid therefor, was assumed to be paid by William B. Laithe, that releases the plaintiff from his liability to the defendant; no fact is anywhere found that the defendant agreed to any release of the plaintiff, or to any change of liability of the plaintiff to him. The only legal inference that can or might be drawn, is that the defendant consented that Laithe should own such stock if he paid for it, and discharged the plaintiff's liability to pay. It is still more inexplicable to my mind, how it is demonstrated that these two cross liabilities of the parties can be created by the same oral agreement, relating to the same transaction, equally depending upon the consummation of the same enterprise for their existence as liabilities from the one to the other, and to accrue as such liabilities at the same moment of time, to wit, upon the organization of an incorporation to be called "The Saratoga Brick and Peat Company,"

and yet the one to be held liable and the other not. If this company was organized, as is found by the learned referee in his fifteenth finding of fact, but which I think is a finding of law, then the defendant was not on that day indebted to the plaintiff. It is equally clear by this theory of the case, that if the incorporation had not been, and was not, formed before the commencement of this action, then the period of the defendant's indebtedness had not arrived, according to the finding of facts by the referee. Inasmuch as the legal organization of this company, in my opinion, is a question of law, it is important that we examine that point.

The things performed by the parties in order to constitute an organization are matters of fact. Whether the performance of those things does constitute an orgnization, is a question of law. These are not changed by their classification in the findings by the referee. The referee, I think, correctly interprets the meaning and intent of the parties in their agreement, that by the organizing or forming this corporation which they were to create, the contingency would have arrived, or the condition would be performed, upon which the $2000 would become due.

As the formation of this body was not directly a legislative act, it could only become a corporation by a compliance with the provisions of the general act which authorizes their organization. (*Laws of* 1848, *ch.* 40.) Under this act and its amendments, three or more persons may make, sign and acknowledge before a proper officer, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the Secretary of State, a certificate in writing, in which shall be stated the corporate name of the company, and the objects for which the corporation shall be formed, &c. It is found by the referee as a fact that no certificate was filed in the office of the clerk of Saratoga county, and no duplicate was ever filed in the office of the

Secretary of State. How then did they become a corporation, and when? How did they become such a corporation as by their agreement they intended? The second section of this statute forbids all inferences or conclusions, which may be drawn from other acts of the parties, by declaring a specific mode, and the particular acts to be performed, which do constitute them a body corporate; and also expressly declares *when* they become such. This, by an acknowledged rule of construction, excludes all other modes. "*When* the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged such certificate, and their successors, shall be a body politic and corporate," &c. There is no statute, I have been unable to find any common law, that authorizes or allows of any other time *when* a corporation of this kind can be formed, under this general law, than that of the *time* of filing the certificate and its duplicate as aforesaid. When a statute which grants power or authority has expressly fixed, limited or declared the time when such authority shall begin to be exercised, all other time is excluded. *Expressio unius est exclusio alterius.* The statute nowhere makes a meeting of the individuals who intend to constitute themselves a corporation; it nowhere makes resolutions, by-laws, or choice of officers, or any other formality prior to the filing of such certificates, the creation of such *corporation*, or the evidence of their existence as such; such acts are not mentioned as having anything to do with their creation; nor do I know of any adjudication of any court to that effect. However necessary or convenient all such proceedings may be in securing a due organization, and to bind the action of its members to that object, whether performed before or after their incorporation of themselves, they are no part of the statute requirement, and they confer no corporate power, no legal right to act as such. The preparation of books and by-laws, and the writing out their proceedings therein before pre-

paring their articles of association, might be very good evidence of the intent of the parties at some future day to become incorporated, but it is nowhere made legal evidence of corporate existence or corporate power, as between themselves, or as to third persons. The referee finds that such acts of the parties were the formation of a corporation *de facto* as to third parties; and that it was so formed as between the parties to this action. Such a finding was unnecessary and immaterial, so far as relates to third persons; no such persons are concerned in the case; and such a finding, as between the parties themselves, whom the law presumes knew it was not true, was error. These parties are presumed to know the law. Each party as well as the other, knew that no legal corporation had been formed. Each had a claim against the other, contingent, or conditioned to become due, upon the formation of a corporation; which means, of course, a legal corporation. Each party is presumed to know what requisites the law demanded in order to create a corporation. Each could make his demand against the other mature and become due, by a creation in conformity with the provisions of the statute. The only agreement or promise of the defendant to pay this $2000, by the proofs, was conditional. The plaintiff could only recover by showing that condition to have been performed. The plaintiff on his part neither proceeded to procure such a compliance with the law, nor made a demand of the defendant to comply with the condition on his part, and of course was met with no refusal by him to act in the matter. The plaintiff's demand was not therefore due when he commenced his action. The period had not arrived when by his agreement it was to become due. He has not even put the defendant in default by showing a demand and refusal on his part to perfect the organization by which it was to become due. It was as much the duty of the plaintiff as of the defendant to see that the organization and act of incorporation was perfected;

indeed, the evidence shows him most in fault. When the articles of incorporation had been prepared by the defendant, and signed and acknowledged by him and the other intended corporators, on the day of their execution, they were delivered to the plaintiff by the defendant; this was the plaintiff's own evidence. Instead of filing them with the clerk of the county and making and filing a duplicate with the Secretary of State, as the statute required, he kept the original and afterwards sent it to Mr. Laithe at Albany, who did not receive it till July 20th, and from that time Laithe held, or kept them, until after this action was commenced, which was on the 27th November, and he (Laithe) then sent it to the plaintiff's attorney. This Mr. Laithe was a party to these articles, and whom the referee finds was to take the plaintiff's stock, as a part of the arrangement. It may, or may not be, significant of design on the part of Laithe who was to pay $5000, as the referee finds, to delay the filing of these articles, and the creation of the corporation, and thereby also delay his own payment. The referee has found nothing on this subject; but it is clear that any delay that is attributable to Laithe is not to be charged against the defendant.

It is very clear from the whole case, and the facts found, that the whole negotiations of the parties and the agreements of liability to each other, were to depend upon the organization, incorporation and success of a stock company for the manufacture of brick and preparation of peat; and that the failure and abandonment by the parties of that enterprise carries with it the basis and consideration upon which the agreements to pay were chiefly made. If this is so, it is unjust that one of the parties should bear all the burthens of the failure. It is true, that under the agreement, the defendant entered into the possession of a largely incumbered farm, and had a few weeks' possession, and until the incumbrances drove him therefrom. It is also true that he paid the plaintiff $1000 of the consideration,

and $300 of interest on the mortgages, with which it was incumbered. So the plaintiff also entered into the possession of a part of the consideration. The defendant's possession of the part of the farm that was clay and peat land, was as trustee for his associates, and was as much the possession of the plaintiff as of the defendant. The possession of the remainder was subject to the mortgages which all the parties knew endangered their future success; for the mortgages covered the peat land also, and as to this, each of the other parties was in interest bound to provide against.

The authorities cited by the plaintiff to prove that corporations, or persons acting and holding themselves out to be such, are estopped from denying their legal incorporation to third persons, and to parties who have been induced to give credit to their representations, are not controverted. The proposition is sound law, but has no application to this case. Here, there was no holding out to third persons; no person is here to complain of having given credit to them as a corporation. The whole transactions were confined to themselves, and among themselves all were equally well informed; and all and each of them knew that there was no incorporation; nobody was misled; nobody deceived.

What then was the *intent* of the parties, by their agreement, whose obligations were to become payable and mature, upon the organization of a corporation? Did they intend it should be a real, a legal corporation, or a mere bogus or sham organization? The action of the parties, subsequent to the agreement, shows that they were not ignorant of what the law required. The articles of association, as drawn up, were under the provisions of the act of 1848, in relation to the formation of corporations for manufacturing, mechanical and chemical purposes, for organizing a brick and peat company. It is clear, then, that in this they gave practical construction to the intent

of their agreement, and that the intent was a real incorporation, such as that statute authorizes, and no other.

I think the learned referee is also mistaken as to there being a *de facto* corporation created. In no one of the cases cited as authority has there been the omission to file certificates of some kind, and of user on the part of the corporations under it. In such cases, where there has been user, defects in their organization do not relieve them from liability as to third persons and to others who have given them credit. They are then as to such persons a corporation *de facto;* but as between themselves, all equally responsible for corporate vitality upon the performance of the act, which alone creates their existence, and without even an act of user, they become neither a corporation *de jure* nor *de facto*. It appears to me it is not only without precedent, but little less than absurd, to characterize such acts as sufficient to create a corporation even *de facto*. All the acts upon which this finding is based transpired three days before the signing of the articles, and must, in contemplation of law, have been understood by the parties as demanding a compliance with the statute, to create a corporation, and not that such acts, of themselves, constituted a corporation, for the articles were handed over to be filed.

I have thus far treated this case as adopting the real findings of fact by the referee, and upon the assumption that all the rulings on the trial are without objection. If we are right in the views we have expressed, then the various rulings of the referee in admitting in evidence the paper signed by the parties, as evidence of the incorporation in question, were error. Its admission was objected to on that ground, and the objection overruled and exception duly taken. The 9th section of the statute under which they proposed to organize, expressly provides what shall be the evidence of an incorporation under that act, and it provides no other, to wit: "The copy of any certifi-

cate of incorporation filed in pursuance of this act, certified by the county clerk or his deputy to be a true copy, and the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated." No statute or common law rule can be found to sustain for that purpose a paper so inchoate and imperfect as that allowed in evidence in this case. By a well established rule of common law, the best evidence which the nature of the case admits must be offered. If the best evidence offered fails to prove the existence of a corporation, it should not be received and acted upon, and the referee erred again, after the plaintiff rested his case, relying on such proof only to establish the existence of a corporation, in refusing, upon request, to strike out such evidence. The referee having acted upon this evidence in his findings, as the case clearly shows, I think the judgment must be reversed, for that reason. The burden of proof to sustain the case was upon the plaintiff, and he failed to make out his case by legal proof. The judgment must, for the reasons given, be reversed.

ROSEKRANS, J., concurred.

BOCKES, J., expressed no opinion.

Judgment reversed.

[SARATOGA GENERAL TERM, November 1, 1869. *Rosekrans*, *Potter* and *Bockes*, Justices.]

McNeil *vs.* The Tenth National Bank in the City of New York, impleaded, &c.

Where certificates of stock are deposited with a broker, by a customer, as *margin*, or additional security against loss to him while carrying other stock for the depositor, the transaction is, in law, a *pledge;* and being such, annexing to the scrip pledged a power of attorney from the owner, authorizing the transfer of the scrip, does not change the character of the transaction, but is merely a necessary act to put the pledge in a condition to be available as such, in case of the pledgor's default.

As between the pledgor and the pledgee, in such a case, the latter has no legal right, secretly or without the knowledge of, or notice to, the pledgor, to sell the stock pledged.

The use of the certificates of stock, by the pledgee, beyond the mere purpose of a pledge, or margin, is tortious, if not felonious.

And a transfer of the certificates by the broker to a third person gives no title to the latter as purchaser, though he pays a valuable consideration therefor, and though the scrip has a blank power of attorney attached; and even though such purchaser believed he was dealing with a person who had authority to sell.

This is the rule in regard to every species of personal property, except commercial paper. *Per* Potter, J.

Certificates of stock have not yet been recognized by the courts as another exception to the rule, and as holding equal rank, in this respect, with bills of exchange and promissory notes. *Per* Potter, J.

If the transaction is a *pledge*, then the pledgor has a right of redemption, and before a sale can be made, by the pledgee, the pledgor is entitled to reasonable notice, and demand of payment of his liability, and there must be default of such payment, on his part.

Such a transaction as the above does not amount to an *agency* of the pledgee for the pledgor.

The case of *Crocker* v. *Crocker* (31 *N. Y. Rep.* 507) commented on, and distinguished; and stated to be unskillfully reported, and well calculated to mislead.

THIS is an appeal from a judgment entered upon the report of a referee. The referee found as matters of fact:

First. That in the month of September, 1866, the plaintiff was the owner of 134 shares, of $100 each, in the capital stock of the First National Bank of St. Johnsville, and at that time he was keeping an account with Charles Good-

year, George Goodyear, George G. Goodyear and Harvey Durand, parties doing business in the city of New York, as bankers and brokers, under the firm name of Goodyear Brothers & Durand; and for the sole and only purpose of securing them for any balance on such account, the plaintiff delivered to, and left with, said firm the certificate or scrip for said 134 shares of stock, with a blank assignment and power of attorney to transfer the same, indorsed thereon, signed by the plaintiff; that no revenue stamp was affixed thereto at the time the plaintiff so signed and left the same with said Goodyear Brothers & Durand, nor has he ever authorized any person to affix a revenue stamp thereto, or consented to one being placed thereon; and at the time he so signed said blank assignment and power of attorney, C. A. Goodyear did not put his name thereto as a witness to the plaintiff's signature, nor has he ever been authorized or requested so to do by the plaintiff, or by any person in the plaintiff's presence, or by his request or consent.

Second. That the account for which said stock was pledged as security has never been rendered or stated to the plaintiff, nor has any demand been made for the payment thereof, or notice given him of the amount thereof, although the plaintiff has frequently asked for a statement of said account, and for the amount due from him thereon, with a view of paying the same, and that he has always been ready and willing to pay the amount due on said account whenever demanded; that there is now due from the plaintiff on said account $3000, with interest from the first day of December, 1866; and that at the time said 134 shares of stock were so left with Goodyear Brothers & Durand, the same was worth $16,080, and that on the 18th day of June, 1868, said stock was worth $17,420, and is still worth that sum.

Third. That previous to the 18th day of June, 1868, the said Goodyear Brothers & Durand were indebted to Fred.

Butterfield, Jacobs & Co. of New York; and to secure such indebtedness they left with the last named firm, among other securities, the said scrip for the 134 shares of stock aforesaid, without the knowledge or consent of the plaintiff.

Fourth. That on the 18th day of June, 1868, Goodyear Brothers & Durand failed in business, and became and were wholly insolvent and unable to pay their debts, and that at the close of business hours on that day they were indebted to the Tenth National Bank of New York in the sum of $90,000 on account of checks drawn by said firm during the day on said bank, and certified as good by said bank, they having failed to make good their account; that afterwards, and on the same day, the said Goodyear Brothers & Durand made their check on said Tenth National Bank for $45,135, payable to the order of Fred. Butterfield, Jacobs & Co., being the amount for which they held the 134 shares of stock, with other securities, so pledged by said Goodyear Brothers & Durand to them, and which said check the said Tenth National Bank certified to be good, well knowing the insolvency of the makers thereof; and on the same or the next day delivered said check to said Fred. Butterfield, Jacobs & Co., and received from them said securities, which check the said bank paid on presentation, Goodyear Brothers & Durand having paid no part thereof.

Fifth. That the plaintiff had no knowledge or information that the said stock-scrip had ever passed out of the hands of Goodyear Brothers & Durand, until after the same came in the possession of the said Tenth National Bank as aforesaid, and that the plaintiff has never consented to any transfer of the same, or authorized any person to fill up the blanks in the transfer and power of attorney aforesaid, on the back of said scrip so signed by him as aforesaid.

Sixth. That at the time the plaintiff so left the said stock-

scrip with Goodyear Brothers & Durand, he was indebted to the said First National Bank of St. Johnsville in the sum of about $7000, and ever since has been indebted to that bank in that sum.

Seventh. That the said Tenth National Bank, at the time they so received said stock-scrip, had no knowledge of the transaction between the plaintiff and Goodyear Brothers & Durand respecting said stock, or of the plaintiff's interest therein; and that said bank realized from the sale of the other securities $29,915.19, and that when the scrip for the 134 shares of stock came in the possession of the said bank as aforesaid, there was affixed to the blank assignment and power of attorney a 25 cent revenue stamp, canceled by the cancelling instrument of Goodyear Brothers & Durand, and the name, C. A. Goodyear, as witness to the plaintiff's signature; and a few days thereafter the cashier of said bank filled in the blank in the assignment and power of attorney aforesaid, the words "J. H. Stout, cashier Tenth National Bank, New York, one hundred and thirty-four (134)," and dated the same 19th of June, 1868, and sent the scrip to the First National Bank of St. Johnsville for the purpose of having said stocks transferred to him as cashier of the said Tenth National Bank of New York, and that such tranfer has not been made, by reason of the injunction in this action, and that said scrip still remains in the possession of the First National Bank of St. Johnsville.

Eighth. That after the said scrip for the 134 shares of stock came in the possession of the said Tenth National Bank as aforesaid, the plaintiff informed said bank that the scrip belonged to him, and had been left by him with Goodyear Brothers & Durand for the sole and only purpose of securing them for any balance of account that might be due them from the plaintiff, and that he was entitled to have said scrip delivered up to him on his paying such balance, which he was willing and ready to pay;

and the plaintiff requested said Tenth National Bank to deliver up to him said scrip on his making such payment, which the said bank declined to do, unless the plaintiff would pay about the value of said stock.

As matters of law the referee found, that the plaintiff was entitled to have said certificate or scrip for said 134 shares of the capital stock of the said First National Bank of St. Johnsville delivered up to him, upon his paying the balance due on his account with Goodyear Brothers & Durand. He therefore decided that the plaintiff pay to the Tenth National Bank of New York the sum of $3518, the balance of his account with Goodyear Brothers & Durand, with interest from the date of his report, within sixty days from the entry and notice of said judgment in this action; and that the Tenth National Bank of New York, upon said payment, deliver up to the plaintiff the said certificate of scrip for the 134 shares in the capital stock of the First National Bank of St. Johnsville, and pay the plaintiff his costs of the action; and he ordered and directed that judgment should be entered accordingly.

From that judgment the defendants appealed to this court.

Hardin & Burrows, for the plaintiff.

E. L. Fancher, for the defendants.

By the Court, POTTER, J. If this case is to be decided upon the same principle of law as if it was depending between the plaintiff and the firm of Goodyear Brothers & Durand, its determination is simple and easy. Between those parties, the stock in question was given by the former and held by the latter as a pledge, for a contingent liability as to amount, and a pledge, in its nature, to whatever might be the amount of liability, differing in

no respect, as to the effect of the contract, from a pledge for a sum certain.

Goodyear & Co. had no authority, in fact or in law, to sell the stock until they had first demanded payment of the plaintiff of the sum due on account of the liability from him to them. (*Wilson* v. *Little*, 2 *N. Y. Rep.* 443.) As I understand the contract between the plaintiff and Goodyear & Co., and as it appears from the evidence and the report of the referee, it is obvious that no absolute sale of the bank stock was ever intended between them. Goodyear & Co., as brokers, were carrying for the plaintiff 200 shares of North Western railroad stock upon a declining market. This railroad stock, itself, failed to be sufficient security to his brokers, and the plaintiff was called upon by them for more *margin*. This, we understand, means, in the broker's lexicon, additional collateral security against loss to the broker, while he is so carrying stock for his employer. The bank stock in question was furnished as such margin. What then were the legal relations between the plaintiff and his brokers in relation to this bank stock? There was no sale of it to the brokers. That is not so claimed. It is only claimed that there was a power of sale. This was necessary in order to make this margin of any security. It is not even argued that, as between those parties, this power of sale was intended to be absolute, and without the usual rights and incidents belonging to a pledge—that of notice to the plaintiff, and his right of redemption. If it was a pledge, there was at law this right of redemption, and before a sale could be made by the pledgee, the pledgor was entitled to reasonable notice, and demand of payment of his liability, and default of such payment on his part. While the pledge remained as such, unaffected by any demand, notice and default, the legal title of the stock (as a general rule) remained in the pledgor; but when the certificate of legal title to the stock is actually intended to be transferred, and the transaction

not intended to be an absolute sale, then, generally, the courts hold it to be a mortgage. In the case before us, there is no express or other agreement shown that would constitute this transaction a mortgage, nor, in fact, any other agreement than such as the law implies, from its being left as *margin*, that is, that the certificate of bank stock was left as collateral security to the brokers Goodyear & Co., in the character of margin, for carrying the 200 shares of North Western railroad stock. Such a transaction, in law, is clearly a pledge. And if a pledge, then the giving of the plaintiff's name to the power of attorney, did not change the pledge, but was a necessary act to put the pledge in a condition to be available, as such, in case of the default of the pledgor. This power of attorney, it is clear, was not in itself the agreement between the parties to it, as to the holding of the stock. That agreement had been made before; but this certificate was the security for the performance of such former agreement on the part of the plaintiff, and this constitutes the bank stock a pledge. (*Dykers* v. *Van Allen*, 7 *Hill*, 497.)

As between the plaintiff and Goodyear & Co., it is clear, then, that the latter had no legal right secretly, or without the knowledge of, or notice to, the plaintiff, to sell his stock to Butterfield & Co., or to the defendants, the Tenth National Bank of New York, because it was a pledge. (*Dykers* v. *Van Allen*, *supra*, 501.) It must be remembered that it was not the stock itself, but the evidence of title to the stock. It was the pledge of a chose in action. This presents the plaintiff's point.

But the defendants, the Tenth National Bank of the city of New York, claim that the transaction in question between the plaintiff and Goodyear & Co., was a case of agency of the latter for the former; that the plaintiff having voluntarily parted with the evidence of title to, or external *indicia* of ownership of, the shares of stock in question, ought not to be allowed to turn over to an inno-

cent party the loss resulting from the misconduct of his broker; that those who have acted in good faith, and have been misled by the instrumentalities and agencies which the plaintiff has himself put in motion, should not now bear the loss, because the plaintiff's agents have deviated from their secret instructions. There is abundant authority to sustain these propositions, in cases of agency. If the defendants have made this rule as to agencies applicable to the case before us, the judgment should be reversed, or modified. The power to transfer the stock in question, upon its face, was expressed to be for value received, the power was declared irrevocable, and the referee found as a fact that the said Tenth National Bank, at the time they received the said stock-scrip, had no knowledge of the transaction between the plaintiff and the said Goodyear Brothers & Durand, or of the plaintiff's interest therein. The case of *Crocker* v. *Crocker* (31 *N. Y. Rep.* 507) is the latest authority cited by the defendants to sustain them in their theory of the case, and that case is also cited by the plaintiff as authority, and claiming a distinction between it and the present, and insisting that such distinction was controlling in their favor. The case of *Crocker* v. *Crocker* is unskillfully reported, and is well calculated to mislead the profession. The statement of the case, and the leading opinion that was adopted by the whole court, is omitted in the report, and an opinion coming to the same conclusion, but which was not read on the consultation, is reported. Though there is nothing in the reported opinion that is in conflict with what was decided, the report entirely fails to present the whole view, and real point of any value in the case; and hence the confusion. The action was brought by R. F. Crocker, the former owner of the stock in question, against S. Crocker, in whose name the stock was held, and others to whom it had been pledged by S. Crocker, the plaintiff alleging that the stock was held by S. Crocker in secret trust for the plaintiff. S. Crocker had

been permitted by the plaintiff, for years, to hold the stock as his own, and in his own name, and from time to time to pledge and hypothecate the stock as security for loans, with the knowledge and consent of the said S. F. Crocker, the plaintiff. But the secret trust between the Crockers was established. The point decided was, that S. Crocker was made to account for this secret trust to the plaintiff—and all the pledgees and mortgagees who took such stock as security, with knowledge of the secret trust, were held not to be *bona fide* holders thereof, and were also held to account to the plaintiff; but all such pledgees and mortgagees as held without notice of the secret trust were protected, for the reason that the plaintiff, by implication of law, having authorized the transfer, repeated use and pledging of the stock to raise money by S. Crocker, with apparent ownership upon the books in his name, could not, as against such *bona fide* holders, hold them liable to account. Such a case was clearly brought within the rule of agency. The agent was clothed with apparent ownership, and with all the *indicia* of ownership, and with actual transfer, with authority to transfer, and a ratification of his transfer. As to third persons, in law, such apparent authority was equivalent to real authority. This is settled law as to agencies.

It is not difficult to distinguish that case from the present. Here there was never any title in the brokers; here no agency to make absolute sale, without first giving notice and making demand, was ever created; no consent to its use to borrow money upon was ever given. The use of the certificate of stock in this case by Goodyear & Co. beyond the mere purpose of pledge, or margin, was tortious, if not felonious. In *Crocker* v. *Crocker* its use was known and authorized; in this case it was unknown and unauthorized by the plaintiff, and we think the transfer conferred no title to a third person as purchaser, though he paid a valuable consideration therefor, and though the scrip had a blank power of attorney attached, and even

though the defendant as purchaser believed he was dealing with persons who had authority to sell. This was so held in *Anderson* v. *Nicholas*, (5 *Bosw.* 121.) We think this is the rule in regard to every character of personal property except commercial paper. (*Id.*)

This kind of chose in action, though greatly used by way of security, and exceedingly convenient for such use in commercial transactions, have not yet been recognized by the courts as another exception to the rule, and as holding equal rank in this regard with bills of exchange and promissory notes. In the case of *Bush* v. *Lathrop*, (reported in 22 *N. Y. Rep.* 535,) is found a most thorough, critical and able review of the conflicts in the cases reported, and of the final settlement of a rule in this respect, to the effect that we have stated. In that case Judge Denio gave the history and progress of the conflicts in the opinions of distinguished jurists, and the adjudications in regard to this question in the courts of England, and in our own country, with that depth of research, learning and fidelity which ever distinguishes the opinions of that able judge; and although three other learned and able members of that court dissented from his conclusions, they were adopted by the court as the law of this State. It would not be becoming in us here to criticise that review of the case, and as little becoming to question, or refuse to follow that authority. It settles the law in that regard. We have only then to see if this case is brought within it.

I have been furnished also with a manuscript opinion in another case recently decided in the Court of Appeals, *Ballard* v. *Burgett*, in which the general rule is repeated, "that a purchaser of personal property, other than commercial paper, acquires no better title than that of his vendor." In that case is a review of a large number of cases cited, which had been supposed to be exceptions, and apparently holding to a different rule, and among them the case of *Wait* v. *Green*, (36 *N. Y. Rep.* 556;) but

the opinion says that the point here in question was not involved in *Wait* v. *Green*. Taking this view of the question, and the opinion of the Court of Appeals in a review of that case, we must adopt their understanding of its doctrine; it would otherwise be in conflict with *Bush* v. *Lathrop*. The court say, that in no one of the cases cited in *Wait* v. *Green* has it been held, "that one to whom property has been delivered *without any intention to transfer the title*, can confer a good title to a purchaser from him;" and to this proposition they cite *Herring* v. *Hoppock*, (15 *N. Y. Rep.* 409,) which fully sustains the proposition. Having thus the opinion of the Court of Appeals as to what effect is to be given to *Wait* v. *Green*, and a full indorsement of *Herring* v. *Hoppock*, we must conform our views to them.

If we are right in the view we have taken of the law upon the points we have discussed, we need not examine the points raised, that the subscription of the witness to the power of attorney was a forgery, or, that the revenue stamp was added without authority. The finding of the referee that the Tenth National Bank, at the time they received the said stock-scrip, had no knowledge of the transaction between Goodyear Brothers & Durand, or of the plaintiff's interest in the said scrip, is not, in the view we have taken of the law, controlling in favor of said defendants. They might be *bona fide* purchasers of a chose in action, and yet their vendor, having no title in himself, could convey none to them.

The result of these views is, that the judgment must be affirmed.

[SARATOGA GENERAL TERM, November 1, 1869. *Roseekrans, Potter* and *Bockes*, Justices.]

STAGG *vs.* ALEXANDER.

Where a debtor settles the amount due from him to his creditor upon notes and drafts, by giving him, in full satisfaction of the claim, a draft on a third person for fifty per cent of the amount, payable in gold, which is subsequently paid, and the creditor accepts such draft and surrenders and cancels the evidences of the indebtedness, this is a good accord and satisfaction.

THE plaintiff sued the defendant, as survivor of the firm of R. J. Lawlor & Co., as acceptor of four drafts, of the dates, amounts, and falling due as follows:

Date, Jan'y	5, 1861,	for	$1465.24,	due	Sept. 8, 1861.
Feb'y	9, 1861,	for	1552.65,	due	Oct. 12, 1861.
March	16, 1861,	for	1208.35,	due	Nov. 19, 1861.
April	20, 1861,	for	1580.19,	due	Dec. 23, 1861.

The complaint admits a payment of $2800 on April 12, 1864.

The answer avers that the drafts were given for the accommodation of the plaintiff. And for a separate defense, the defendant avers that the defendant, being indebted to the plaintiff, gave to him a draft, dated at Matamoras, March 12, 1864, drawn by H. E. Woodhouse on J. H. Woodhouse, of New York, for $2800 in American gold, in full of the claim, and that the draft was paid.

The case was tried before Judge J. F. BARNARD and a jury, in January, 1868. The defendant, being called as a witness, proved the partnership of himself and Robert J. Lawlor, and produced five promissory notes of his firm, dated in April, May and June, 1861, for within about $200 of the amount in the aggregate of the four drafts, and testified that he settled these notes with the plaintiff, by giving for them the draft of $2800 in gold. The plaintiff, being called as witness, proved that the drafts and notes represented the same debt; the former having been substituted for the latter, so that the plaintiff could use them in bank. The drafts were all given at the same time, but dated back, for the accommodation of the plain-

tiff. The debt grew out of the importation of goods by the plaintiff for R. J. Lawlor & Co., on which the only compensation of the plaintiff was a commission of from two and a half to five per cent. With reference to the settlement, the plaintiff testified in open court, in substance, that he agreed to take fifty cents on the dollar for his debt, and then the defendant placed the amount, $2800 and some cents, in gold, on the table. Then, and not afterwards, the plaintiff counted the gold, and then, and not afterwards, gave the notes to the defendant. The plaintiff then being in possession of the gold, and the notes given up to the defendant, the plaintiff asked what he could do with the gold, and the result was that the defendant went out and bought the draft. The defendant said he "would do nothing but pay me in gold; he said he would go and see if he could buy a draft for me, I think of a person named Woodhouse; he went out, and came back, and said he could buy a draft for $2800. I said he could buy it."

Before the trial the plaintiff was examined as a witness by the defendant, and gave then a version of the settlement not materially different from that on the trial; but on that examination he said, "I gave him the notes when the gold was placed before me; I counted the gold and gave him the notes; the settlement was made then, and there, for the notes."

The amount due on the notes at the time the plaintiff collected the Woodhouse draft, viz., April 12, 1864, was:

Principal, ...	$5619 15
Interest, ...	837 98
Total, ...	$6457 13

This assumes that the notes, and not the drafts, represented the true amount due. The amount received by the plaintiff, in currency, was $5418. It was therefore claimed that if the plaintiff was bound to credit the amount that

the gold produced in currency, his debt was still unpaid to the extent of $1038.95, and interest from April 12, 1864.

At the close of the testimony the defendant's counsel moved for a dismissal of the complaint, upon the ground that an accord and satisfaction was shown. In the first place, that the draft was purchased by the defendant and given in full payment and settlement of this claim; secondly, it showed the debt on which this suit was brought had been paid and liquidated, and the securities or the vouchers for the debt had been surrendered, which amounted to a release in law. That there was no dispute about that fact; both parties agreeing that these notes were surrendered up, and that that was the last of it. That here was a full settlement in accord and satisfaction of this whole claim. The plaintiff himself saying these drafts and notes represented one single and distinct transaction; that it had been settled by the payment made and by the delivery of this draft of $2800, and that the notes, which were the evidence of the debt, had been delivered up to the defendant, and had been canceled, and there was nothing for Mr. Stagg to base his suit on at the time he commenced this action.

The court granted the motion to dismiss the complaint, and the plaintiff appealed from the judgment of dismissal.

Aug. F. Smith, for the appellant. I. The receipt by the holder of a note past due, of a part of the sum due on the note, in full, does not discharge the debt beyond the sum received. (*Harrison* v. *Close*, 2 *John.* 448. *Seymour* v. *Minturn*, 17 *id.* 169. *Dederick* v. *Leman*, 9 *id.* 333. *Hunt* v. *Bloomer*, 5 *Duer*, 202.)

II. The question whether the plaintiff took the gold, or whether he took the Woodhouse draft in full, was a question of fact for the jury. The court took the question from the jury and nonsuited the plaintiff.

C. A. Runkle, for the respondent. I. It was admitted on the trial, by the plaintiff, that the drafts sued on, and the notes which had been paid by Alexander at Matamoras, represented one and the same transaction—were given in payment of the same debt. There was no question to be submitted to the jury. The plaintiff and defendant were both examined in full on the trial, and both swore that when the defendant offered the plaintiff the gold he declined to receive it, and the defendant went out and bought the draft in question. Until the draft was given to the plaintiff, and the notes given to the defendant, the transaction was not closed. When this draft was given to the plaintiff the notes were given to the defendant. There was no dispute about the facts.

II. The plaintiff accepted the draft in question in payment of the debt, and surrendered the notes to the debtor. That amounted to a full accord and satisfaction of the debt. 1. A note or draft of a third person, though for a less amount than the debt, is a good accord and satisfaction. (*Le Page* v. *McCrea*, 1 *Wend.* 164. *Kellogg* v. *Richards*, 14 *id.* 116. *Brooks* v. *White*, 2 *Metc.* 283.) 2. The note of the debtor indorsed by a third person, though for less than the debt, if accepted in full satisfaction, is a good accord and satisfaction. (*Boyd* v. *Hitchcock*, 20 *John.* 76.) 3. The note of a third person, indorsed by the debtor, is a good accord and satisfaction. (*N. Y. State Bank* v. *Fletcher*, 5 *Wend.* 85. *Booth* v. *Smith*, 3 *id.* 66.) 4. If the creditor takes from the debtor the note of a third person as payment, it is a good accord and satisfaction. (*St. John* v. *Purdy*, 1 *Sand.* 9.) 5. If a creditor receives from one partner the note of a third person, indorsed by him, in payment of the debt of the firm, it is a good accord and satisfaction. (*Frisbie* v. *Larned*, 21 *Wend.* 450.)

III. Where it was the intention of the parties that the payment or settlement should be received in full satisfac-

tion, the court will, if possible, sustain it. (*Kellogg* v. *Richards*, 14 *Wend.* 116.)

By the Court, GEO. G. BARNARD, J. I am of opinion that under the circumstances of this case the payment of fifty per cent in gold, in full satisfaction of the plaintiff's claim, accompanied by the surrender and cancelment of the paper evidence of the claim, was a good accord and satisfaction. Gold was at a premium of nearly one hundred per cent, and with the gold the debtor could get paper which would as well pay his debt as gold. The creditor agrees to accept gold, and in effect to buy his own paper money or keep its equivalent in gold, as he elected. It seems to me, however, quite clear, from the evidence, that the draft was received, and not the gold. The defendant testifies so, expressly. The plaintiff, I think, does not raise an issue upon this question. He says, when the gold was placed on the table, "I said 'what can I do with it? can't you give me a draft?' he said no, but might buy me one; he said he would go and see, and came back and said he could buy a draft. I said 'he could buy it;' he brought the draft in, payable to my own order. I took the draft."

The transaction was not complete until the plaintiff accepted something; he did not accept the gold; he did accept the gold draft on a third person, which was subsequently paid in gold. I think the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Geo. G. Barnard* and *Cardozo*, Justices.]

LINDAUER *vs.* THE FOURTH NATIONAL BANK OF THE CITY OF NEW YORK.

Where one bank receives from another a draft belonging to a customer, for collection merely, without advancing any money or giving any credit thereon, it has no title to the draft which will authorize it to retain the moneys received thereon, as against the true owner, on account of overdrafts of the remitting bank.

A bank, receiving from another negotiable paper for collection, obtains no better title to it, or the proceeds, than the remitting bank had; unless it becomes a purchaser for value, or makes new advances on the faith of it, without notice of any defect of title.

And it does not become such purchaser, or make such advances, by reason of its having a balance against the remitting bank, for which it had refrained from drawing, or from having made further advances after the receipt of the negotiable paper.

APPEAL from a judgment entered upon the report of a referee.

On the 6th of May, 1867, the plaintiff delivered to the First National Bank of New Orleans, for collection, a draft on A. Belmont & Co., New York, for $440.15 in gold, which said bank undertook to collect and pay to the plaintiff, less commissions. The New Orleans bank forwarded the same to the defendants, who received it on the morning of May 11th, and collected it. The defendant was corresponding bank of the New Orleans bank, which had overdrawn its account on May 11, 1867, under an agreement that the defendant would allow the New Orleans bank to overdraw its account, and the defendant would hold its remittances for collection as collateral for any such overdraft; and these overdrafts had been allowed on the faith of such agreement, and of advices of remittances in which were included the draft in question, until the receipt of which the defendant had refused to make further advances, but after receiving which the defendant did make further advances. The balance still due the defendant was over $50,000, and it claimed the right to apply the proceeds of this draft against this balance, and refused payment

thereof to the plaintiff. Whereupon this suit was brought, and was referred to D. P. Ingraham Jr., Esq., who found that the plaintiff was the owner of the draft, and that the defendant had made no advance to the New Orleans bank, upon the same, or upon the credit thereof. And he reported in favor of the plaintiff for $609.40, (the currency value of the gold,) and from the judgment entered on his report the defendant appealed.

Livingston K. Miller, for the appellant. I. There was no privity between the plaintiff and defendant. The defendant was not the agent of the plaintiff, but of the New Orleans bank, which in its turn was the agent of the plaintiff. The defendant owed no duty to the plaintiff. This, under the decisions, is a fatal objection to the plaintiff's right to recover. (*Costigan* v. *Newland*, 12 *Barb.* 456. *Denny* v. *The Manhattan Co.*, 2 *Denio*, 115; *affirmed in Court of Errors*, 5 *id.* 639. *Colvin* v. *Holbrook*, 2 *Comst.* 126. *Montgomery County Bank* v. *Albany City Bank*, 3 *Seld.* 459.) And in *West* v. *American Exchange Bank*, (44 *Barb.* 175,) it is conceded that it would have been a good point if it had not been waived by the answer.

II. The next question in this case is, had the defendant a right to retain the proceeds of the draft in question as against the debts of the New Orleans bank to it? Under the decisions of the United States courts, this right could not be questioned. It could be held under the general bankers' lien for antecedent advances, even had there been no advances, or no credit given on the faith of said remittances. (*Bank of Metropolis* v. *New England Bank*, 1 *How. U. S. Rep.* 234. 6 *id.* 212. *Swift* v. *Tyson*, 16 *Peters*, 1.)

III. This ruling has not been followed to its full extent in our State courts, and the rule as established by the various decisions in this State seems to be, that in order that the receiving bank may retain moneys so received, it must be made to appear, either 1st, that the receiving

bank has given absolute credit to the remitting bank for the draft when received, without waiting for its collection; or, 2d, must have paid something, parted with some value on the faith of it. We claim that both have met in this case. The defendant passed this draft at once to the credit of the plaintiff as cash. "Q. Were the remittances inclosed in letter of May 6, Ex. No. 1, credited to the New Orleans bank when received, or after collection? A. When received." See also Ex. No. 2. And they did make payments on the faith of it. "We did pay the drafts of the First National Bank of New Orleans all day on May 11, 1867, to the extent of $13.578." The defendant had refused to make advances until advised by telegram of the remittances, but did thereupon advance and increase the indebtedness of the New Orleans bank.

IV. On these undisputed facts, it remains to be seen if the propositions above stated are the law of this State as applicable to this case. The first case we refer to, *Stalker* v. *McDonald*, (6 *Hill*, 93,) is the decision of the Court of Errors, with but one dissenting voice. It is cited for the general principle laid down in it, and because it is referred to with approval by the courts in some of the other cases cited. It decides that an innocent holder of negotiable paper received in the usual course of trade, for a valuable consideration, though received from a person having no title, will be protected as against the true owner; otherwise, if the holder parted with no value. In *Clark* v. *The Merchants' Bank*, (2 *Comst.* 380,) the court held that where drafts for collection had been transmitted to a banking house, who received and credited them, and the parties remitting the drafts drew against them, the title to the drafts so credited had passed, although the drafts drawn against them were not paid, the parties who had received the drafts for collection having meanwhile failed. In this case the parties collecting the drafts had deposited the proceeds with the defendant, who claimed to hold them

as against their advances, and the court sustained the right of the bank so to do. The court held in this case that the test is, "Was the draft received for collection merely, or to be credited to plaintiff when received, whether collected or not?" *Prima facie*, they say, the legal title passed. This goes to establish the defendant's first ground of claim to this draft. In *Warner* v. *Lee*, (2 *Seld.* 144,) the court held that the circumstances of the case were notice to the defendant, which would prevent his retaining the proceeds of the note, and that the defendant had made no advances. The facts in the present case are far different. *Scott* v. *The Ocean Bank*, (23 *N. Y. Rep.* 289,) is a case of a transfer of a bill to secure a precedent debt and not credited till after payment, and is unlike the present case. In *McBride* v. *Farmers' Bank*, (26 *N. Y. Rep.* 450,) it was held that the defendants could not retain the proceeds of the collections, because they had parted with nothing—given no value—no credit on the strength of it; and leaving it fairly inferable that had the facts been different, as they are in our case, the rule would have been different. (This case will also be found in 25 *Barbour*, 657, where the same rules are laid down.) The last case in the Court of Appeals is that of *The Commercial Bank of Clyde* v. *The Marine Bank*, (1 *Transcript Appeals*, 302.) This follows the ruling of the other cases above cited. It will be observed at page 303 of the case, "that, upon the trial, the plaintiff asked the court to charge the jury that, unless the defendant gave Lee & Co. some new credit, or made advances, or parted with some value on the credit of the Crocker draft, the plaintiff was entitled to recover, which was refused." A verdict was rendered for the defendant, and reversed by the Court of Appeals, not precisely because of the above error in the charge. But we claim that the above request to charge represents the law as established in the above cases, and as applicable to the facts of the present case. In *Dickerson* v. *Wason*, (48 *Barb.* 415,) the same question arose, inci-

dentally, before the general term of this court, and the intimation there is decidedly in favor of the defendant's position. It may, perhaps, be claimed that the case of *West* v. *American Ex. Bank*, (44 *Barb.* 175,) is authority against the defendant. It is, in some respects, like the present; but it will be observed in the head note and decision, that the court expressly put the plaintiff's right to recover upon the ground that "it is not found that the defendants paid said drafts upon the credit or faith of the note in question, or of its proceeds;" and citing *McBride* v. *The Farmers' Bank*, (26 *N. Y. Rep.* 450,) they say, "without this, the subsequent advances are insufficient to sustain the defendant's claim." Now, in the present case, it is in evidence, uncontradicted, that the defendant did make advances upon the faith of this draft, and therefore the case does not apply.

V. It will be noted, that the memorandum accompanying the draft "for collection and advice," obviously means that inasmuch as it was a gold draft it was necessary that the remitting bank should be advised of its collection, and the premium in gold when paid, otherwise they could not, as in the case of a currency draft, tell what amount to enter in their books. It will also be borne in mind that in the cases cited, the advices as to remittances were by letter, and could be at length. Here the advices were by telegram, and the defendant's action was predicated upon their reasonable intendment, as justified by subsequent facts. Telegrams are now considered by the court as of equal force with correspondence. (*Johnson* v. *Clark*, *N. Y. Transcript*, *Nov.* 26, 1868.)

VI. It will be also observed by reference to schedule 3, that between 7th May, date of first telegram, and 11th May, the time when this remittance was received, inclusive, the defendant had received, including this draft, $121,028.19, and had paid $138,051.82, so that it *had*

in reliance on these telegrams, and on the faith of this and the other remittances parted with value, paid $17,000 *more* than it had received, (corroborating the witness' testimony,) and showing that the referee erred when he found that the defendant had made no advances upon the said bill of exchange, or upon the credit thereof. It must be evident from these cases that the referee was misled as to the effect of the decisions of the Court of Appeals, and that his findings are erroneous. The rule of law as there laid down does not defeat, but establishes, the defendant's right to hold this draft and its proceeds. There is no conflicting evidence. There is but one witness, and he called by the defendant.

VII. But if it should be claimed by the plaintiff that the defendant on the 11th May received $60,000, and paid but $13,500, and cannot, therefore, hold the proceeds of this draft as against the $13,500 paid, we reply: 1. That the defendant *had* a right to apply the draft as against the $13,500 paid, and that the plaintiff, a stranger, cannot dictate how it should elect to apply it, when the party remitting gave no directions. 2. That the defendant had a right to apply all above the $13,500 to the prior indebtedness of the New Orleans bank, and to insist on applying this draft and such other of the remittances of that day as it pleased, to that day's advances. It had a right to apply it to the most precarious security. (2 *Parsons*, 632.) 3. That the defendant had a right to say, as it did say in effect, "We will not pay any more of your drafts unless you not only furnish us the funds so to do, but also pay something towards the liquidation of your balances already due," and that they receive the $60,000 on that understanding and promise. 4. That they could, and therefore did, say on that day: "We have received $60,000 from you, and have applied it in payment of the drafts of this day, (May 11,) and have applied the rest upon your former balance.

Samuel A. Noyes, for the respondent. I. Upon the facts alleged in the complaint, and admitted or not denied by the answer, and *especially* upon proving (what is admitted) that the draft was delivered to the defendant *for collection*, the plaintiff is entitled to judgment, whether the defendant advanced on the draft or not. (*Warner* v. *Lee*, 6 *N. Y. Rep.* 144. *West* v. *Am. Ex. Bank*, 44 *Barb.* 175.) 1. The letter inclosing the draft to the defendant, and the indorsement on the draft itself, clearly show that it was forwarded to the defendant and received by it *for collection*. 2. The referee has found that the draft was forwarded to the defendant *for collection*, and his finding is fully supported by the evidence. 3. The fourth finding of the referee aforesaid is not excepted to by the defendant, and it is bound by it as correct.

II. Now if, as the defendant claims, it was on May 7th, 8th and 9th, 1867, telegraphed that remittances were on the way, and on and after May 7th, paid out checks and drafts of the First National Bank of New Orleans, relying on those remittances to arrive, and yet when this gold draft with other drafts arrived on the morning of May 11, 1867, with notice that it was sent *for collection*, the defendant can only hold such remittances, if any, when they arrive, as belong to the First National Bank of New Orleans.

III. The First National Bank of New Orleans never did pledge by telegram, and had no power to pledge in any way, what never belonged to it.

IV. The defendant never advanced on this draft, or on the faith or credit of it or its proceeds. The defendant's acts, as testified to, show just the contrary. 1. The referee has so found, and his finding is fully supported by the evidence. 2. The defendant credited the proceeds of this draft *separately*, in a gold account, in a *separate book* from all other debits and credits of the First National Bank of New Orleans. 3. The defendant never charged *any drafts*, *paid any discounts* or *advances* of any kind against this

draft or its proceeds. 4. All the drafts or checks of the First National Bank of New Orleans, paid by the defendant May 11, 1867, or previously, and every other charge against the First National Bank of New Orleans—*all* are charged against other remittances from the First National Bank of New Orleans, as shown in "Ex. No. 3." 5. The defendant's cashier (Seaman) testified that the proceeds of the draft were *never credited* to the First National Bank of New Orleans, in "Ex. No. 3," which is a copy of the account rendered by the defendant to the First National Bank of New Orleans, or its receiver.

V. All the authorities agree, that to justify a creditor bank in withholding paper received under the circumstances disclosed in this case, a credit must have been given, or an advance made on the strength of the *particular paper* in question, or its proceeds. (*West* v. *Am. Ex. Bank*, 44 *Barb.* 175. *McBride* v. *Farmers' Bank*, 25 *id.* 661. 26 *N. Y. Rep.* 453, 454.) It is absurd to suppose that the defendant ever gave any credit or made any advance on the faith of this draft, for it never *even knew* that this draft *existed* until it arrived on May 11, 1867, and on that day (Saturday, May 11, 1867, the last day on which the defendant paid any drafts or checks of the First National Bank of New Orleans) the defendant received $61,130, and only paid out and advanced $13,578.

VI. The defendant has been *fully paid* for all advances to the First National Bank of New Orleans, after and including the morning of May 7, 1867, when the first telegram was received. 1. Subsequent to the morning of May 7, 1867, the date when the first telegram was received, the defendant received, as appears by its account with the First National Bank of New Orleans, $161,187.11, and paid out, on and after May 7, 1867, $156,804.76. Commencing May 7, 1867, the defendant received $161,187.11; paid out, $156,804.76; leaving a balance of $4,382.35. 2. The above shows that the defendant received $4,382.35

more than it paid out, on and after May 7, 1867. 3. The defendant, in addition to the above surplus, received, over and above what it paid out, $1200 in gold, not included in Ex. No. 3.

VII. The agreement between the defendant and the First National Bank of New Orleans, that the defendant should hold all collection paper or its proceeds as collateral for the overdrafts of the First National Bank of New Orleans, does not in any way justify the defendant in holding this draft or its proceeds. It is in no way an advance upon the draft. (*West* v. *Am. Ex. Bank*, 44 *Barb.* 175. *McBride* v. *Farmers' Bank*, 26 *N. Y. Rep.* 453, 454.)

It is therefore submitted that it has been clearly shown:

1st. That as soon as the defendant *even knew of the existence* of this draft, it had notice of the plaintiff's title, and that it was sent to it for collection only.

2d. That the defendant has never given any credit or made any advance upon this draft, or upon the faith and credit thereof.

3d. That even conceding (which we do not) that the defendant has made an advance upon the faith and credit of this draft, it has been fully paid and satisfied for every advance.

The judgment is in all respects correct, and should be affirmed.

Geo. G. Barnard, J. The defendant had no title to the draft in question that enables it to retain the money it received thereon, as against the true owner. It was sent to the defendant for collection, and was received by it for collection only. That the First National Bank of New Orleans, the bank which sent the paper for collection, had overdrawn its account and had telegraphed that remittances were on the way, by force of which the defendant continued to pay its drafts, can make no difference. The draft did not belong to the New Orleans bank. The New

Orleans bank did not claim to own it, never transferred it to the defendant or attempted to transfer it. The defendant advanced no money—gave no credit on this draft. The remittances referred to in the telegraphic dispatches, to the extent of over $60,000, did come, and the defendant received them. In the same package came the plaintiff's gold draft, for collection. It was on the remittances of the Bank of New Orleans—its own funds—that the credit was given, and not on the plaintiff's demand expressly sent for collection. The judgment should be affirmed, with costs.

CARDOZO, J., concurred.

CLERKE, P. J. The decisions of the United States courts, upon the question involved in this case, have never been countenanced by the courts of this State. The principle laid down in *McBride* v. *The Farmers' Bank of Salem, Ohio*, (26 *N. Y. Rep.* 450,) disposes of this case. A bank, receiving from another negotiable paper for collection, obtains no better title to it, or the proceeds, than the remitting bank had, unless it becomes a purchaser for value, or makes new advances on the faith of it, without notice of any defect of title; and it does not become such purchaser, or make such advances, by reason of its having a balance against the remitting bank, for which it had refrained from drawing, or from having made further advances after the receipt of the negotiable paper, in reliance upon a course of dealing between the banks, without any special reference to it.

In this case the referee finds that the defendant made no advance to the First National Bank of New Orleans upon this bill of exchange, or upon the credit of it.

The judgment should be affirmed, with costs.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Geo. G. Barnard* and *Cardozo*, Justices.]

HUNNIER *vs.* ROGERS.

A testator, after making various bequests, and giving "all the rest, residue and remainder" of his estate, both real and personal, unto his children living at his decease, and to the issue of such of them as should then be dead, empowered his executors to sell his real estate, in these words: "And I authorize and empower my executors * * * to sell all or any part of my real estate, at any time, in his or their discretion, at public or private sale, and to execute valid deeds of conveyance for the same, to the purchaser or purchasers thereof." *Held* that the will gave a clear power of sale to the executors, as to the testator's lands. That the power was a general power in trust under our statutes, and the trusts were authorized by the statute. And that a sale of the lands by the executors, under the power, was legal, and passed a good title to the purchaser. CLERKE, P. J., dissented.

A purchaser from executors will get a good title if the will gives them a valid power of sale.

APPEAL from a judgment entered at a special term allowing a demurrer to the complaint and dismissing the complaint, with costs.

The action was brought by a vendor, against the purchaser, to enforce the specific performance of a contract for the sale and purchase of real estate. The material facts are set forth in the opinion of Justice CLERKE.

GEO. G. BARNARD, J. The conveyance by the executors of David Sampson passed a good title to the property in question. The will gives a clear power of sale of the testator's lands. It imposes upon the executors the duty of paying the testator's debts and legacies, and upon a certain contingency, the payment of money to the testator's unmarried daughters. The power is a general power in trust under our statutes. The trusts are authorized by the statute. The sale of the land under the will was legal. That there may be sufficient property to relieve the real estate, is not the subject of inquiry when a vested power in trust is executed. That question is material in determining whether the power should be exercised as between the

executors and the beneficiaries, but a purchaser will get a good title if the will gives a valid power of sale.

The court at special term fell into an error, and the judgment should be reversed and the demurrer overruled, with leave to the defendant to answer in twenty days, on payment of costs.

CARDOZO, J., concurred.

CLERKE, P. J., (dissenting.) This action is brought to enforce the specific performance of a written contract, by which the plaintiff agreed to sell, and the defendant agreed to purchase, certain real estate in the city of New York. The plaintiff had purchased this property from the executors of one David Sampson, deceased, under a power of sale contained in his will. By the provisions of this will, Sampson, after making a number of bequests, gives "all the rest, residue and remainder of his estate, both real and personal, unto his children living at his decease, and to issue of such of them as may then be dead," &c. Lastly, he empowers his executors to sell his real estate, as follows: "And I authorize and empower my executors, or such of them as shall qualify, the survivors and survivor of them, to sell all or any part of my real estate, at any time, in his or their discretion, at public or private sale, and to execute valid deeds of conveyance for the same, to the purchasers thereof."

In my opinion this power is clearly void. It is repugnant to the previous devise in fee to his children, &c. This case is very similar to that of *Quin* v. *Skinner*, (33 *How. Pr.* 229,) decided at the general term in the second district. The will in that case contained several bequests; and the testator devised and bequeathed all the rest, residue and remainder of his estate to his wife and to her heirs and assigns forever, and concluded by empowering his executors to sell and convey his real estate, &c., and to

pay over the proceeds to his wife. It was held that this was a general power in trust, and was manifestly repugnant to the direct and absolute devise to the plaintiff, his wife, and was void. The same principle is held, throughout, in *Lovett* v. *Gillender*, (35 *N. Y. Rep.* 617.)

The plaintiff's title to the property in question fails; and being unable to perform her part of the contract, the defendant cannot be compelled to accept the conveyance which she has tendered.

The judgment should be affirmed, with costs.

Judgment reversed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke*, *Geo. G. Barnard* and *Cardozo*, Justices.]

THE NATIONAL PARK BANK OF NEW YORK *vs.* THE NINTH NATIONAL BANK.

Although the drawee of a draft is bound to know the handwriting of the drawer, and when he pays a draft on which the name of the drawer has been forged, he is bound to bear the loss to the same extent he would have been if the signature had been genuine, yet the liability extends no farther.

Where a genuine draft has been altered, not only in the name but in the amount to be payable, the rule does not hold the drawee liable for any more than the amount of the original draft. The balance, he may recover of the person from whom he received the draft and to whom he paid the money. SUTHERLAND, J., dissented.

APPEAL from an order made at a special term, sustaining a demurrer to the amended complaint in this action.

It was alleged in said amended complaint, that the plaintiff is and, at the times hereinafter mentioned, was a corporation, duly incorporated and existing under and by virtue of an act of the congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the

circulation and redemption thereof," approved June 3d, 1864, and has capacity to sue by the above title. That the defendant was, at the times herein mentioned, and still is, a corporation, duly incorporated and existing under and by virtue of said act. That at said times, the Ridgely National Bank of Springfield, Illinois, was, and now is, a corporation duly incorporated under and by virtue of said act. That at Springfield, Illinois, on March 25th, 1867, said Ridgely National Bank drew its certain draft or bill of exchange, numbered 48558, dated at said place, on that day, wherein and whereby it directed the plaintiff to pay to the order of Ely Shirley the sum of $14.20. That said Ridgely National Bank thereupon delivered said draft to the payee. That thereafter, and before the payment by the plaintiff to the defendant hereinafter mentioned, the amount of said draft was changed from $14.20 to $6300, and the name of said payee was changed from Ely Shirley to E. G. Fanchon, Esq. That said changes in the amount and name of the payee of said draft were made fraudulently, and without the authority, consent or knowledge of said Ridgely National Bank or the plaintiff; that the name of Wm. Ridgely, cashier, signed to said draft, being the name of the cashier of said Ridgely National Bank, and the name by which the drafts of the same were drawn, was taken out or erased from said draft, before the payment thereof by the plaintiff, by means of acid or other chemical process, and that the said name was thereupon rewritten by the person who made said erasure as originally made. That the changes and rewriting of the said name as aforesaid were unknown to the plaintiff until May 10th, 1867, as hereinafter stated. That after the alterations above mentioned, and before the payment of said draft by the plaintiff, the same was discounted by the Lexington National Bank, and became the property thereof, and by it was indorsed to the defendant. That after such alterations, indorsement and delivery to the defendant, and on or about April 12th, 1867, the de-

fendant indorsed said draft, and presented the same to the plaintiff, bearing the indorsement of said Lexington National Bank, and an indorsement purporting to be the indorsement of E. G. Fanchon, and demanded the payment thereof. That said Fanchon, at the time of said indorsement, was cognizant of, and privy to, said alterations. That on or about said April 12th, 1867, the plaintiff, in ignorance of said alterations, and supposing that the draft was as drawn, paid the said amount of $6300 to the defendant on said draft, as so altered, and received said altered draft from the defendant, and now has the same in its possession. And the plaintiff alleged that on or about May 10th, 1867, it for the first time knew or discovered said alterations, and that said draft was not genuine as to the amount and payee thereof; and that the plaintiff forthwith, and on said May 10th, 1867, notified the defendant of the fact of said alterations, and demanded the repayment of the sum of money paid to the defendant as aforesaid, and tendered said draft to him, and offered to return the same on the repayment of the amount due, and that it still is, and ever since has been, ready to return said draft to the defendant on the repayment of said sum; and the defendant refused, and ever since has refused, to repay said sum, or any part thereof. And the plaintiff averred that it had been guilty of no negligence or laches in the premises. That the signature, Wm. Ridgely, cashier, rewritten on said draft as aforesaid, and now being thereon, has been recognized as genuine by said Ridgely National Bank and the plaintiff, and that said draft is recognized by said Ridgely National Bank and the plaintiff as genuinely drawn for said sum of $14.20, so far as concerns the signature of said cashier. Wherefore, the plaintiff demanded judgment against the defendant for the principal sum of $6400, less $14.20, the amount of the genuine draft, to wit, $6285.80, with interest from April 12th, 1867, and the costs of this action.

The defendant demurred to the said amended complaint, for the grounds that it appears upon the face thereof:

First. That there is a defect of parties plaintiff herein in this, that the Ridgely National Bank of Springfield, Illinois, should have been made a party plaintiff to this action.

Second. That there is a defect of parties defendant herein in this, that the Lexington City National Bank of Lexington, Kentucky, should have been made a party defendant to this action.

Third. That the said amended complaint does not state facts sufficient to constitute a cause of action.

The following opinion was given by the justice at special term, on deciding the issue raised by the demurrer:

SUTHERLAND, J. It appears from the complaint that not only the amount and name of the payee of the bill or draft was altered, but also that the name or words "Wm. Ridgely, cashier," purporting to be the signature of the cashier of the drawer to the altered draft or bill, was forged, or counterfeited. The case, therefore, made by the complaint, is within the rule laid down by Lord Mansfield in *Price* v. *Neale*, (3 *Burr.* 1354.) This decision was not overruled in *Smith* v. *Mercer*, (6 *Taunt.* 76,) but was recognized by a majority of the judges. Neither in *Smith* v. *Mercer* nor in *Cocks* v. *Masterman* (9 *B. & C.* 902) were the plaintiffs the drawees, but they were the bankers of the drawees. The rule laid down in *Price* v. *Neale* was fully recognized in *Canal Bank* v. *Bank of Albany*, (1 *Hill*, 287;) *Bank of Commerce* v. *Union Bank*, (3 *N. Y. Rep.* 230;) *Goddard* v. *Merchants' Bank*, (4 *id.* 147;) and *United States Bank* v. *Bank of Georgia*, (10 *Wheat.* 333.) The elaborate and able brief submitted by the counsel for the plaintiff has failed to satisfy me that I would be justified, either by precedent or authority, in so altering or qualifying the rule as laid down in *Price* v. *Neale* that it will not include the

plaintiff's case, or in making the plaintiff's case an exception to the rule. The defendant therefore must have judgment on the demurrer, with costs.

From this decision the plaintiff appealed.

Barlow & Hyatt, for the appellant. I. The general rule of law is, that money paid under a mistake of fact can be recovered back in an action for money had and received.

There is no doubt that the plaintiff paid this money to the defendant under the common mistake of all parties as to the facts. The Park Bank paid this draft under three mistakes of fact. 1st. As to the genuineness of the signature of the drawer. 2d. In ignorance of the change in the name of the payee. 3d. In ignorance of the change in the amount.

II. But the defendant claims that the case of a forged draft paid by the drawee is an exception to the above mentioned general rule. It claims the rule to be, that such drawee is estopped from denying the signature of his drawer, and if he pays a forged bill he cannot under any circumstances recover the money, no matter how careless the holder may have been, and no matter whether or not the recovery would put the holder in a worse position than if the payment had never been made.

III. We, on the other hand, claim that the party paying a forged draft can recover in two cases: 1st. Where the holder or party receiving has himself been careless or in fault; that is, that the loss must fall where the first carelessness has been in point of time. 2d. Where, although there has been no fault on the part of the holder, yet the recovery will put him in no worse position than if the payment had never been made. That is to say, where the drawee has done any act to give currency to the paper (as by acceptance, &c.) on the faith of which the holder has taken it, or the condition of the holder will be altered for the worse in any way, as where he received the draft

for collection, and paid over the proceeds to an insolvent principal before he received notice of the forgery, then the party paying is precluded from recovering by the ordinary rules of estoppel—otherwise not. If the court shall assent to these rules as we lay them down, we shall show that we come within them both. The rule, as claimed by the defendant, has never been established by decisions in this State. It has been assumed to be the law in several cases in the Court of Appeals, which will be referred to hereafter, but the court will see that the assumption was *obiter*, and not necessary to the decision of the cases. Therefore this court is not restrained by any authority of our own courts from laying down such rule as seems best upon principle.

IV. At the bottom of all the law on this subject are four English cases, which we ask the court to examine critically. The leading case of all is *Price* v. *Neale*, (3 *Burr.* 1354,) decided by Lord Mansfield in 1762. Price, the drawee, had paid two forged bills drawn on himself, and sued to recover back the money from Neale, the holder. *Held* that he could not recover. One bill he had accepted before Neale took it, and the decision as to that one came within the rule as we admit it to be, and the ordinary rules of estoppel. The other bill he had simply paid, having done nothing to give it currency. This case is like the one at bar, and is unquestionably a decision in favor of the rule as contended for by the defendant. Lord Mansfield rests his decision on two grounds: 1st. That all the negligence was on the side of the plaintiff; that "it was incumbent on the plaintiff to be satisfied of the hand of the drawer, but it was not incumbent on the defendant;" "that whatever neglect there was, was on his (the plaintiff's) side;" that "it is a misfortune which has happened without the defendant's fault or neglect;" and, 2d. On the ground that even if there were no neglect on the part of the plaintiff, yet there was no rea-

son for throwing the loss from one innocent person upon another. In other words, that where both were equally innocent, (by which is meant free from negligence,) the plaintiff could not recover; but the loss must lie where it has fallen. Now this last ground has been wholly repudiated, and if *Price* v. *Neale* can be sustained at all, it must be on the ground that all the negligence is on the part of the party paying. The law now is, that where both parties are innocent, or free from carelessness, or both are negligent, the party paying can recover. *Price* v. *Neale* properly turned on the negligence of the plaintiff. See *Markle* v. *Hatfield*, (2 *John.* 462.) And as to the law just laid down, i. e., that where both parties are equally negligent or equally free from negligence, the party paying can recover, see *Canal Bank* v. *Bank of Albany*, (1 *Hill*, 290,) where it is said, "for the very reason that the parties were equally innocent, the plaintiffs have a right to recover," &c. &c. In the case cited, the negligence of both parties was the same. (See page 290, line 6.) See, also, on this point, Dallas, J., in *Jones* v. *Ryde*, (5 *Taunt.* 495.) So in the *Merchants' Bank* v. *McIntyre*, (2 *Sand.* 431, 436,) Ch. J. Oakley says: "Either the defendants knew of the defect, * * * or they were at least equally negligent with the plaintiffs. In the latter case it is the ordinary case of mutual ignorance of an important fact, and either party may rescind, and the plaintiff may recover." See also *Ellis* v. *Ohio Life Ins. Co.*, (4 *Ohio Rep.* [*N. S.*] 661,) where this is stated to be the New York rule. The idea that in equal negligence the plaintiff cannot recover, is based upon a mistaken application of the maxim, "*In pari delicto, potior est conditio defendentis.*" This maxim, however, is based upon the moral turpitude of the parties, which induces the law to decline to help either party on grounds of public policy. It does not apply to innocent mistakes. Therefore we ask the court to carefully bear in mind that the second ground

of Lord Mansfield's decision, i. e., that the plaintiff cannot recover where both parties are equally free from negligence, or equally negligent, is wholly repudiated by the subsequent cases, and, among others, by those just cited. The next case is *Smith* v. *Mercer*, (6 *Taunt.* 76,) decided in 1815. Temple had drawn a bill on Evans. The plaintiffs were the bankers of Evans, and the bill was presented to them by the defendant, bearing what purported to be an acceptance by Evans, payable at the plaintiffs' bank. The plaintiffs paid it, and having discovered that the acceptance by Evans was forged, brought an action to recover back the money. The court held that they could not recover, because the forged direction to them to pay the bill was like the call of a bill drawn upon them, and they were bound to know the handwriting of their customer, Evans. This also is like our case, and an authority for the rule contended for by the defendant. But the judges were not unanimous, nor did their opinions rest on the same grounds. Dallas, J., decides for the defendants on the first ground of *Price* v. *Neale*, to wit, that all the negligence was on the side of the plaintiffs, but he brought in the point of change in the holder's situation and the actual loss, and gave it a prominent place. Heath, J., decides for the defendants, on the same ground. Chambre, J., dissented, and repudiated point blank the doctrine of *Price* v. *Neale*, and made some very forcible remarks on Lord Mansfield's doctrine, that it is not unconscientious for the defendant to retain the money. (See page 84.) Gibbs, Ch. J., decides for the defendants, on the ground that indorsers were discharged, thereby putting it upon just the ground which we contend for, i. e., the change in the situation of the holder. He does not dissent from the ground taken by Dallas, J., and Heath, J., neither does he assent to it. It will be seen that only two out of four judges assent to the principle of *Price* v. *Neale*. We shall criticise that case hereafter in connection with the case at

bar. Mr. Justice Sutherland has intimated, in his opinion in this case, that the fact that the plaintiffs in *Smith* v. *Mercer* were not the drawees, but the bankers of the drawees, distinguishes that case from the one at bar. But the direction of Evans to the plaintiffs, his bankers, to pay the draft, was like any other direction of a drawer to his drawee. The question was whether the plaintiffs were bound to know the handwriting of their customer, Evans, which is the same general question involved in this case. The next case is *Wilkinson* v. *Johnson*, (3 *Barn. & Cress.* 428.) In that case the plaintiffs were the bankers of A. Heywood, Son & Co., and took up for their honor a bill on which their name was forged as indorsers, and on discovering the forgery they brought the action to recover back the money, and it was held they could recover. Being the bankers of A. Heywood, Son & Co., they were within the rule contended for by the defendant—as much bound to know the handwriting of their correspondents as the Park Bank in this case was bound to know the handwriting of its correspondents, and yet it was held that the plaintiff could recover. This case therefore, in effect, overrules *Price* v. *Neale*. It will not do to say that the fact that the forgery was discovered the same day, distinguishes it from *Price* v. *Neale;* because, as Abbott, Ch. J., says, on page 434, of *Wilkinson* v. *Johnson*, "The decision of Lord Mansfield, in *Price* v. *Neale*, appears not to have been grounded on the delay." *Price* v. *Neale* in no way turned on the delay, or on the injury done to the holder, or any change in his condition. It merely went on the ground that the negligence of the plaintiff was such as to deprive him of any rights which any one was bound to respect. Therefore the circumstance, that in *Wilkinson* v. *Johnson* the forgery was discovered on the same day, makes no difference, and that case virtually overrules *Price* v. *Neale*. It is true the court attempted to distinguish the case from *Price* v. *Neale*, because of a natural reluctance to overrule

the prior decision of the same court, and the supposed distinction arises out of the fact that the payment is for honor. But this is no real distinction, as our Court of Appeals say, in *Goddard* v. *Merchants' Bank*, (4 *N. Y. Rep.* 147, *head note*, 2*d paragraph, and page* 149;) for if the rule be that it is inexcusable negligence for the drawee not to know the handwriting of his drawer, it applies with as much force where the payment is for honor, as in any other case, and the court, in *Ellis* v. *Ohio Life Ins Co.*, (4 *Ohio Rep.* [*N. S.*] 655,) expressly says, with reference to *Wilkinson* v. *Johnson*, that the payer for honor is in the same position as an ordinary drawee. Now, one of two things is certain—either *Wilkinson* v. *Johnson* overrules *Price* v. *Neale* outright, which disposes of this case, or it rests upon the distinction that "the circumstances of the call upon the plaintiff (drawee) were such as might reasonably lessen his attention, and that the fault was not wholly his own." (See page 436.) We shall refer hereafter to the circumstances which bring us within this case, if it rests upon this distinction. Abbott, Ch. J., says: "Such a call, for payment, imports on the part of the person making it, that the names of the correspondent for whose honor the payment is asked, is actually on the bill;" and that "the attention of the person making the payment may reasonably be lessened by the assertion that the call itself makes to him in fact, though no assertion may be made in words; and the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him." This case also decides, "that where there is any fault in the party receiving, and he cannot be said to be wholly innocent, he ought not to profit by the mistake into which he may by his prior mistake have led the other, unless there be a change in the situation of parties," &c. That is, where the fault begins, there the loss should fall. The next case is *Cocks* v. *Masterman*, (9 *Barn. & Cress.* 902.)

This, also, is an authority for the defendant herein, if it can be sustained. In this case the bill was paid on May 24th, and the forgery was discovered and notice given to the defendant on the next day, May 25th, in time to give notice to all the indorsers. Yet it was held that the plaintiff could not recover. The court seem to have felt the absurdity of holding that the mere payment of a bill by the drawee, where he had done nothing to give it currency, and the condition of the holder would not be changed by the recovery—which is the doctrine of *Price* v. *Neale*—should preclude the party paying from recovering. Therefore, they being in the element of injury to the defendant, that is, that the delay to discover the forgery until the next day, though no indorser had been discharged, deprived the holder of a right, was an injury to him, which precluded the plaintiff from recovering. This bringing in the element of actual injury to the holder was a step in the proper direction, and is, in effect, the rule which we contend for—that is, that where the recovery does not change the condition of the holder for the worse, the party paying may recover. But we do combat the assumption of the court, as a matter of law, that the delay to discover the forgery until the next day, no indorser having been discharged, was an injury to the holder. We shall discuss hereafter the question of "injury to the holder," but here will merely remark, that on this point *Cocks* v. *Masterman* is inconsistent with *Wilkinson* v. *Johnson*, and we submit that the latter is the much better considered case. The delay to discover the forgery in the latter case was not held to bar a recovery. But it will be said that the delay to discover the forgery in *Wilkinson* v. *Johnson* was only a few hours, while in *Cocks* v. *Masterman* it was twenty-four hours, and that the difference in the facts prevents the two cases from being inconsistent. But why have you a right to assume, as matter of law, that a delay of twenty-four hours injures the holder more than a delay

of three hours? Where injuries to the holder from the delay are the ground of resisting the recovery, there are only two logical courses—either to require the holder to show the actual injury, which we claim to be the proper rule, or else to presume and hold, if you are to make any presumption about it, that any delay in discovering the forgery, i. e., the mere fact of payment, is sufficient to bar a recovery. It is absurd to assume as matter of law, that twenty-four hours delay produces irreparable injury, while three hours do not. *Wilkinson* v. *Johnson* having shown that a few hours delay does not, of itself, bar a recovery, you cannot consistently with that case hold that twenty-four hours delay must, of itself, inflict such an injury as bars the plaintiff. In *Canal Bank* v. *Bank of Albany*, (1 *Hill*, 287,) *Cooks* v. *Masterman* is disapproved, and in *Goddard* v. *Merchants' Bank*, (2 *Sand.* 257,) it is stated to conflict with *Wilkinson* v. *Johnson*.

V. These are the four cases on which all the law rests. They rest on the negligence of the party paying, and that negligence consists in the neglect of the "means of knowledge." The drawee is supposed to have a superior means of knowledge, in that he has paid other drafts of his correspondents, and by comparing the signatures and by other means can detect the forgery. Now there have been two English cases decided since 1840, which entirely overrule the doctrine that a payment of this kind is such laches as precludes the party paying from recovering in the cases where no harm is done to the holder. These cases are *Kelly* v. *Solari*, (9 *Mees. & Wels.* 54,) and *Townsend* v. *Crowdy*, (8 *Com. Bench*, [*N. S.*] 477.) The first of these cases decides that even forgetfulness of facts which were once known does not have this effect. In *Kelly* v. *Solari*, a policy of life insurance had lapsed and become void, for failure to pay the premium. The directors were informed of this, and actually marked the policy "lapsed," but forgetting the fact, paid a loss under it, and

then bronght action to recover the payment. In *Townsend* v. *Crowdy*, the plaintiff was to pay the defendant a certain sum for his business, provided the profits had amounted to a sum named. He examined the books, and satisfying himself that the specified sum had been realized, paid the defendant, and having afterwards discovered his mistake, brought an action to recover the money. In both these cases it was held that the plaintiff could recover, and the doctrine stated by Bailey, J., (the same judge who decided *Cocks* v. *Masterman*,) in *Milner* v. *Duncan*, that means of knowledge was equivalent to knowledge, and that a neglect of it was laches, is utterly repudiated. Williams, J., says, in *Townsend* v. *Crowdy*, (*p.* 494,) "No doubt at one time the rule that money paid by mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover had been guilty of no laches." But since *Kelly* v. *Solari*, it is established that it is not enough that the party had means of knowledge. Byles, J., says, (p. 495,) "Here the money was paid by a mistake. That being so, it was manifestly against conscience that the defendant should retain it. It would be inequitable not to allow it to be recovered back." In *Kelly* v. *Solari*, Thesiger, arguendo, says, (*p.* 56,) "The rule is, that if money be paid under a mistake of fact, it can be recovered back, unless something has subsequently occurred to render it unconscientious to recover it." This doctrine was adopted by the court, and is the rule as we contend for it, that a change in the condition of the defendant must be shown, to prevent a recovery. In the same case, *Kelly* v. *Solari*, Parke, B., says, (*p.* 58,) "The position that the party paying is precluded from recovering the money by laches, in not availing himself of means of knowledge in his power, is based on a dictum of Mr. Justice Bailey in *Milner* v. *Duncan*, and cannot be sustained; * * * but if the money be paid under the impression of the truth of a fact which is *not* true, it may,

generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact." And again: "I think that where money has been paid under a mistake, i. e., upon the supposition that a certain fact is true, and the money would not have been paid had it been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." In *Kelly* v. *Solari*, and *Townsend* v. *Crowdy*, the recovery of the plaintiff did not alter the condition of the defendants; if it had, the defendants would not have been allowed to recover in accordance with the rule as we claim it. But these cases must be considered as entirely upsetting the absurd rule, that mere carelessness and neglect to use the means of knowledge, such as existed in the case at bar, can prevent a recovery, where no injury has been done thereby. These cases have had the effect to change the rule as laid down in *Smith's Leading Cases*, (*note to Marriott* v. *Hampton*, *vol.* 2, *4th ed.*) The rule is stated to be, that money paid by mistake of fact cannot be recovered back, where the party paying has been guilty of laches. *The Utica Bank* v. *Van Geison* (18 *John.* 485) is wholly in accordance with *Kelly* v. *Solari*. There the plaintiffs once knew, but had forgotten, a fact, (the memorandum that the note was not to be protested if not paid,) and yet they were not held to have been negligent. At a much earlier date *Price* v. *Neale* was, in effect, overruled by *Bruce* v. *Bruce*, cited in note to *Jones* v. *Ryde*, (5 *Taunt.* 495,) and commented upon by Gibbs, Ch. J., in *Smith* v. *Mercer*, (6 *id.* 77.) This case was exactly like the case at bar, and is a decision in our favor, and overrules *Price* v. *Neale*. For it is certain that unless the Victualing Office, the drawee of the bill, could have recovered the amount from the Bank of England, and the Bank of England could have recovered it from the plaintiff in that case, (*Bruce* v. *Bruce*,) the plaintiff would not have recovered from the defendant.

VI. After a consideration of these authorities, we ask the court to consider, on principle, the rule contended for by the plaintiff. What is the sense of saying that a mere lucky accident shall authorize a man to retain my money which has come into his hands by that accident, and where he will be no worse off by repaying it, than if he had never received it? My negligence and carelessness is no reason why I should lose my money, unless some one has acted upon it, and been injured thereby. You might as well say that if by my careless way of carrying my pocket-book I lose it, the finder may conscientiously retain it, because of my negligence in losing it. One rule would be as sensible as the other. Lord Mansfield says, in *Price* v. *Neale*, that it can never be against good conscience for the defendant to retain the money under such circumstances. The absurdity of this doctrine is well exposed by Chambre, J., in *Smith* v. *Mercer*, (*p.* 84;) and in extracts made above from the opinions of the judges in *Kelly* v. *Solari*, and *Townsend* v. *Crowdy*, the doctrine that my mere negligence can give another title to my property, is wholly repudiated. Byles, J., says: "It would be inequitable *not* to allow it to be recovered back."

VII. There is one great principle of law by which the right of the defendant to retain this money should be tested, and unless it can apply that principle to us we should recover. This principle is the doctrine of *estoppel in pais*. The doctrine of *Price* v. *Neale* is entirely opposed to the general doctrine of *estoppel in pais*. That doctrine is, that no one is estopped from denying the existence of a fact, or retracting a statement which he has made, unless the other party has acted upon it and will be injured by allowing the truth of the admission, or the existence of the fact, to be disproved. The right of an acceptor to resist the payment of a bill which he has accepted, and his right to recover back the amount of a bill which he has paid, rest on precisely the same grounds; for the court

has seen above, that the right of the party receiving to retain the money, cannot at this day be put on the ground of "*potior est conditio possidentis.*" That doctrine of Lord Mansfield was repudiated in the cases cited, point IV, and in *Kelly* v. *Solari*, &c. The paying, or certifying, a forged check are equally negligent acts on the part of a bank, and must have precisely the same effect on their rights. (*See Canal Bank* v. *Bank of Albany*, (1 *Hill*, 289;) *Goddard* v. *Merchants' Bank*, (4 *N. Y. Rep.* 152.) Now the rule of *estoppel in pais* is laid down in *Plum* v. *Cattaraugus Ins. Co.*, (18 *N. Y. Rep.* 392, 395,) and in the other cases cited in 2 *Abb. Dig. p.* 587, and is this: That an *estoppel in pais* will exist against a party where it appears, 1st. That he has made an admission which is clearly inconsistent with the evidence he proposes to give; 2d. That the other party has acted upon the admission; and 3d. That he will be injured by allowing the truth of the admission to be disproved. A drawee who pays a bill admits that the signature is genuine. To hold that he cannot disprove it as against one who will not be injured by allowing it to be disproved, is to fly in the face of all the cases on estoppel. If a man brings me a note purporting to be signed by myself, and asks me if it be genuine, and I say it is, I presume no lawyer would contend that I am estopped from denying the signature, in a suit against me, unless the holder took it afterwards on the strength of my admission, or unless, relying on the admission, he had failed to charge the indorsers, or something of this kind; and if I had paid such a note, I could recover it back. The Court of Appeals has decided this very point in *Merrill* v. *Tyler*, (*Selden's Notes*, 47, cited in 2 *Abb. Dig.* 588, § 106.) They there hold that a man's admission as to the genuineness of his own signature only estopped him to the extent that the other party had acted upon it, and would suffer actual damage. Yet, how is it more negligent not to know my customer's signature than not to know my own?

The *Continental Bank* v. *Bank of the Commonwealth*, tried in the Supreme Court, in the April term, first district, before Judge Noah Davis, was put to the jury on that principle, i. e., that a taking of the paper on the faith of the admission must be shown.

VIII. Thus stands the case upon principle, and the authority of later cases and text books is also against the doctrine of *Price* v. *Neale*. First, we have *Kelly* v. *Solari*, and *Townsend* v. *Crowdy*, cited above. Then Chitty, in the last edition of his Treatise on Bills, (12th ed. 1854,) at marginal page 431, says: "It has been contended that a payment to a *bona fide* holder of a forged draft cannot be recovered, because the drawee was bound to know the handwriting of the drawer and the genuineness of the bill; and because the holder, being ignorant of the forgery, ought to have the benefit of the payment by mistake. But, on the other hand, it may be observed that the holder who obtained payment cannot be considered as having shown sufficient circumspection. He might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument, even of the drawer or indorsers themselves, and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss has already attached upon himself, and where the payment to him has not altered his situation or prejudiced him. Of late, these considerations have influenced the courts in their decisions." So Chitty says, at same place: "Gibbs, Ch. J., alone placed the decision in *Smith* v. *Mercer* (6 *Taunt.* 76) on the true ground, to wit, 'that the plaintiff's delay in making the discovery destroyed the remedy over the defendant.'" In *Goddard* v. *Merchants' Bank* (2 *Sand.* 253) the court fully indorse these remarks of Chitty, and say that the decision of the court (afterwards affirmed) was much influenced by it. So the language of

Chitty is approved in *Ellis* v. *Ohio Life Ins. Co.*, (4 *Ohio Rep.* [*N. S.*] 659,) cited below. In *McElroy* v. *Southern Bank of Kentucky*, (14 *Louisiana An. Rep.* 458,) the court laid down the rule precisely as we contend for it, and held that the plaintiff could recover in a case precisely like the one at bar, inasmuch as they had not done anything to give currency to the bill before the defendants took it. The case of the *Canal Bank* v. *Bank of Albany*, (1 *Hill*, 287,) was a case where the plaintiff paid on a forged indorsement, and it was held it could recover. This case is not, of course, analogous to the one at bar; but Judge Cowen, on page 290, makes some remarks upon the point under discussion. He says: "It was said in these cases that the payer takes upon himself the knowledge of his correspondent's handwriting; even this is going a great way, unless some bona fide holder has purchased the paper on the faith of such act." This is an intimation in favor of the rule as we contend for it. *Ellis* v. *Ohio Life Ins. Co.*, (4 *Ohio Rep.* [*N. S.*] 628,) which we shall refer to hereafter, also adopted the rule as we claim it. In *Parsons on Notes and Bills*, (*p.* 599, *ed. of* 1863,) *Price* v. *Neale*, and those cases, are called the earlier cases, and treated as substantially overruled. The case of the *Irving Bank* v. *Wetherald* (36 *N. Y. Rep.* 335) wholly admits the principle claimed by us. This case decides that the certification of a check by a bank being an admission of a fact within the peculiar knowledge of the bank, binds it, and the bank is estopped from denying it as against any one who has acted on the admission. But where the bank certifying informed the other party of the mistake in time for the latter to charge indorsers, and before any change of circumstances had taken place, the former was not bound by the admission. Now the right to recover money paid on a forged bill, being treated by all the cases as resting on precisely the same principles as the right to resist the payment of a forged bill which has been accepted, (the idea that mere

possession gives any title to the money having been exploded,) the case just cited conclusively establishes the principle we contend for.

IX. Now let us apply these authorities and principles to the case at bar.

Here, the Lexington National Bank bought this bill outright from Fanchon, who was cognizant of the forgeries; in other words, he was the forger. They then sent it on here to the defendant, to whom we paid it. We paid it on April 12th, 1867, and did not discover the forgery and give notice until May 10th, 1867. If we are allowed to recover this money, will the defendant be any worse off than if we had refused payment on April 12th? We say not. In the first place, it will be said that if we had refused payment on April 12th, the bill would have been protested and the indorser and drawer held, and that they are released by our negligence. But this is not so; no protest, or notice of protest, was necessary to enable the defendant to have its full remedy against all previous parties. The drawer is not discharged, because there is no drawer, the name being forged; or rather, there is a drawer only as to the $14.20, and *that* we are liable for. The defendant does not need any protest or notice to enable it to recover against the Lexington City Bank. If it held it for collection, it can recover against its principal, as on money paid by mistake. (*See Goddard* v. *Merchants' Bank*, 4 *N. Y. Rep.* 151.) If the defendant *bought* it from the Lexington bank, it can recover on the implied warranty that the instrument is genuine, and the Lexington bank need no notice to enable it to recover against the forger, Fanchon. (*See* 4 *N. Y. Rep.* 151.) The principle that there is no need of notice of dishonor to enable each party to recover against all those whose names were on the bill when he took it, is perfectly well settled. (*See Jones* v. *Ryde*, 5 *Taunt.* 493; *Gompertz* v. *Bartlett*, 24 *Eng. Law and Eq.* 156; *Herrick* v. *Whitney*, 15 *John.*

240; *Shaver* v. *Ehle*, 16 *id.* 201.) Therefore the one ground on which Gibbs, Ch. J., bases his opinion in *Mercer* v. *Smith*, and which Chitty says is the only true ground, to wit, the *release of indorsers*, is wanting in this case. It does not appear in the complaint whether the defendant bought this bill from the Lexington City Bank or received it as agent, for collection. It makes no difference which it was. If it received it for collection, and before notice had paid over the amount and settled its accounts with its principal, perhaps we should have been obliged to bring this suit against the principal, though it would not affect our right to recover against *some one*, and would not affect the principles we have been discussing above. But even this would not be so, unless we knew it was agent when we paid it. (*See Canal Bank* v. *Bank of Albany*, 1 *Hill*, 293; and *Merchants' Bank* v. *McIntyre*, 2 *Sand.* 435.) And *Fuller* v. *Smith* (1 *Carr. & Payne* 198) holds that in no case should we be obliged to sue the principal instead of the agent, to whom we paid the money. But it is enough to say, on this point, that even if the language of the complaint imported (which it does not) that the defendant held the bill as agent for collection, still the payment over to its principal, and that we knew it to be agent, must be pleaded. The point cannot arise on this demurrer. In considering whether we ought to recover against the defendant, we must consider whether the defendant can recover even against the Lexington bank; and we admit that whatever circumstances would render it inequitable for us to recover against the Lexington bank, should prevent our recovery against the defendant, inasmuch as the Lexington bank will finally have to bear the loss. If the Lexington bank, or the party (Fanchon, so called,) from whom they received the draft, has become insolvent between the time of the payment of the draft by us and our discovery of the forgery, then we ought not to recover the amount from the defendant because injury has resulted

from our act. But such insolvency, if it exist, is matter of defense, and must be alleged, which is not done in the answer. Dallas, J., intimates, in *Smith* v. *Mercer*, (*supra*,) that it must be alleged and proved by the plaintiff in such a case, that no change has occurred, to the injury of any parties, by the neglect of the plaintiff. This was a casual remark, and such a doctrine is opposed to several principles of law. In the first place, it requires the plaintiff to allege and prove a negative, i. e., that the parties have not become insolvent. Secondly, those matters are more peculiarly within the knowledge of the defendant than of the plaintiff—the Lexington bank the immediate correspondent of the defendant, and Fanchon being the correspondent of the Lexington bank, while neither of them have any relations with the plaintiff; therefore, any proof as to change of circumstances in those parties comes more properly from the defendant than from the plaintiff. Thirdly, the presumption of law is that a man is solvent rather than insolvent: if the latter is claimed, it must be proved. (*Walrod* v. *Ball*, 9 *Barb.* 271, 276.) Fourthly, an estoppel must be strictly proved; and if we have shown, as we think we have, that this is to be construed on the principles of all other alleged acts of estoppel, then the defendant, or party claiming the estoppel, must make out all the facts necessary, and among others show the change of circumstances. We think these four reasons are conclusive as to the duty of the defendant to show these facts if they exist. The dictum of Dallas, J., was uttered when it was held and supposed that a drawee who had inadvertently paid a forged draft had no rights which any one was bound to respect. Since the decision of *Kelly* v. *Solari* he cannot however be considered as an offender, as it were, and the rules of pleading which apply to ordinary cases of estoppel must be applied to him. But it may be said that even though there may have been no change in the solvency of the parties, yet that our delay facilitated the escape of the

forger. Our answers are, first, that the arrest of the forger is a public and not a private remedy, and the court cannot presume that the simple arrest of the forger has any relation whatsoever to the recovery of the money. If it be said that it gave the forger time to remove his property, our answer is that the court must presume that all mankind act with common sense and ordinary prudence, and must assume that the forger had as securely taken off himself and his property within three days, after he passed this draft to the Lexington bank, as he had in thirty days, and so nobody lost anything in that respect. And again, the reasons given above for putting the burden of allegation and proof as to solvency, &c., upon the defendant rather than on the plaintiff, apply equally to the supposed loss from giving the forger more time to escape. If there were any loss from that cause, the defendant must allege and prove it. Again, the loss from the possible removal of property by the forger is too remote to be taken into consideration, even if alleged and proved. The furthest the law will go is to consider whether the party responsible has lost his property (i. e. become insolvent) by our delay, so as to impair the remedy over of the defendant; whether he has removed it, or put it into a shape where it would be less accessible, is too remote a damage to be considered. In *Utica Bank* v. *Van Geison*, (18 *John.* 485,) the plaintiffs had paid, under a mistake of fact, in which they were certainly as much chargeable with negligence as we are here, and yet they were not required to show that the solvency of the maker of the note had not changed—although, if it had changed, that fact would no doubt have been a defense, inasmuch as the act of the plaintiffs in paying over the money to the defendant had induced the defendant to abstain from suing the maker. But it was left to the defendant to show it. Therefore we say we are entitled to judgment on this demurrer, because the sound rule is that we can recover unless our delay has

produced a change for the worse in the condition of the defendant, which it is for him to allege and prove.

X. Next, we claim the right to recover on this further ground. That no matter what loss to the defendant be alleged and proved as a consequence of our delay, yet where both sides are guilty of carelessness, the loss must fall upon the party who has been guilty of the first negligence in point of time, and we claim as a matter of fact that this is the defendant. And our argument here is, that whatever may have been the case at the time that *Price* v. *Neale* &c. were decided, yet the rule and practice now are, that a bank presenting paper to another bank for payment is supposed to have made proper inquiries as to its genuineness, and to have satisfied itself as to the character of the parties &c. from whom it was received. That it is well understood among banks, that the bank paying relies much upon this supposed scrutiny of its predecessors, and that to use the words of Abbott, Ch. J., in *Wilkinson* v. *Johnson*, "the circumstances of the call upon the drawee, may reasonably lessen his attention." The bank presenting the paper for payment, thus (according to the custom of banks in their dealing with each other) taking some part of the responsibility, is, in the case of a forged bill, guilty of the prior negligence, and comes within the cases which hold that the party paying can recover where all the negligence has not been on its side. *Wilkinson* v. *Johnson* goes the entire length of holding that the party guilty of the prior negligence must bear the loss. The case goes upon the doctrine that presentment of a bill for payment for honor is an assertion in fact, if not in words, that the bill is all right. We say that, under the modern system of banking, the presentation by one bank to another, is a representation that it is all right. (*See also Chitty on Bills*, 431.) *Byles on Bills*, 9th edition, (1866,) 324 and 325, says: "Money paid under a mistake of fact, may be recovered back. But any fault or negligence on the part of him who

pays the money on the note, will disable him, (this is exploded by *Kelly* v. *Solari*, unless actual damage be caused;) but where the fault is not entirely on the part of the party paying, he may recover." This recognizes the principle that the prior negligence in point of time, must bear the loss. See *Ellis* v. *Ohio Ins. Co.*, (4 *Ohio*, [*N. S.*] 628,) a very strong case on this subject. And *Price* v. *Neale* goes on the principle that "all the negligence" is on the part of the party paying. Therefore, if we show that part of the negligence was on the part of the party taking the draft from the forger, *Price* v. *Neale* does not apply. In *Wilkinson* v. *Johnson* the court said, from the nature of the case, that the presentation of the draft "reasonably lessened the caution of the plaintiffs." They did not require proof of any custom to rely somewhat on the party presenting. So the court being presumed to know the general course of business, must know without any proof the effect which the presentation by a respectable bank must have had to lull the caution of the plaintiff. The question really is, not whether it is the custom for banks to rely on the representation of genuineness implied by the presentation, but whether the bank paying must not in the nature of things be affected by the circumstances of such presentation, so as "reasonably to lessen its caution." That the court takes judicial notice of the course of business among banks, see *Smedes* v. *Utica Bank*, (20 *John.* 377;) *Bronson* v. *Wiman*, (10 *Barb.* 406, 425;) and *Smith* v. *N. Y. Central Railroad*, (43 *id.* 231.)

XI. But it may be said that although as a general rule no man is estopped from repudiating his acts or words unless the other party has suffered damage therefrom, yet the credit of negotiable paper requires a different and peculiar rule. To this we answer, 1st. That in no case is this rule put upon the peculiar nature of negotiable paper. 2d. That the credit and free circulation of negotiable paper is not promoted by the rule that a drawee who pays a

forged draft cannot recover the amount, though his carelessness has done no harm, unless the possibility that a drawee may, by mistake, pay the draft, though forged, enters into the calculation of those who deal in paper, which we deny to be the case. One who is about to take a piece of paper considers two things: 1st. Is it genuine; and, 2d. Are the parties solvent? The chance that even if it be a forgery the drawee may by accident pay it, never enters into the contemplation of any one, and the rule cannot, one way or the other, have the slightest bearing upon the currency of negotiable paper. Moreover, these cases are so very few in number that their effect would not be appreciable any way. None of the cases have been put on the ground of the "sanctity of commercial paper;" and if that were the ground, *Goddard* v. *Merchants' Bank*, and *Bank of Commerce* v. *Union Bank*, are as much a violation of it as this case. See 4 *Ohio R.* (*N. S.*) 665, on this doctrine of sanctity of commercial paper as applied to forged paper.

XII. Although this precise point, i. e., the point involved in *Price* v. *Neale*, has never been decided in this State, yet the tendency has been in favor of the plaintiff recovering in such cases. Thus in *Bank of Commerce* v. *Union Bank*, (3 *N. Y. Rep.* 230,) the court held that the drawee could recover when the alteration was in the body of the instrument. And in *Goddard* v. *Merchants' Bank*, (4 *N. Y. Rep.* 147,) they hold that a person who pays for honor without looking at the bill can recover, and surely the negligence of one who pays without looking at the bill is greater than that of one who looks and is deceived by the nicety of the forgery. These cases, as stated above, certainly assumed the rule to be as claimed by the defendant; though Judge Ruggles, in his opinion, at p. 152, recognizes and admits the doctrine of "actual damage," which we contend for. But the point was not involved, and the cases show a tendency to make exceptions to the supposed rule, and it is

believed that if the question had been before the court, the absurdity of the rule of *Price* v. *Neale* would have led to its entire repudiation and to the establishment of the rule as above laid down.

XIII. *U. S. Bank* v. *Bank of Georgia* (10 *Wheat.* 333) is an authority against us. But that case rests upon *Price* v. *Neale*, and if the modern decisions and principles have upset that case, the case just cited must fall also. Moreover, that case was a case of one receiving that which he had issued as money, and there are reasons of public policy well set forth in 10 *Wheaton*, pages 345 and 347, which make a distinction between the case of money and bills of exchange. One practical reason why a bank which has received what purports to be its own bills issued as money should not be allowed afterwards to repudiate them is, that in most cases it would be impossible to trace back money, and to remember when and from whom it had been received, which is not the case with bills of exchange. But on the principles above set forth we deny the soundness of the rule, even as to money. *Levy* v. *U. S. Bank* (*Dall.* 234) is a *nisi prius* case, and not at all considerable, and can be of but small authority. *Young* v. *Adams* (6 *Mass. R.* 187) is also a case of money. But the best answer to all these cases is that they rest on *Price* v. *Neale*, and that that case, as authority for the rule to the extent contended for by the defendant, has been much weakened, and in many cases overruled by subsequent decisions, as above stated. That it has not been overruled in England is, it is believed, because the question has not been presented for decision of late years. The case of the *National Bank of the Commonwealth* v. *Grocers' National Bank* (35 *How. Pr.* 412) will, no doubt, be cited against us. But that case involved only a small amount, and does not seem to have been very thoroughly argued; and, moreover, it was rested distinctly upon *Price* v. *Neale*, without any examination into its principle, and upon dicta of the Court of Appeals.

And also the loss resulting from the payment of the check seems to have been assumed, and the case to have been decided upon that assumption.

As to Judge Sutherland's opinion in this case at special term, we respectfully submit, that it is hardly correct to say that the doctrine of *Price* v. *Neale* was adopted by a majority of the judges (if that is meant by the word "recognized," used by Judge Sutherland) in *Smith* v. *Mercer*. Chambre, J., distinctly repudiates it, and Gibbs, Ch. J., neither assents nor dissents from this doctrine, but puts the case on the ground of a discharge of indorsers, which ground does not exist in this case. Dallas, J., also gives the element of actual loss and change in the holder's condition a prominent place in his decision. The fact that the plaintiffs in *Smith* v. *Mercer*, and *Cocks* v. *Masterman*, were not the drawees, but the bankers of the drawees, is, we think we have shown above, immaterial. The recognition of the doctrine of *Price* v. *Neale* in *Canal Bank* v. *Bank of Albany; Bank of Commerce* v. *Union Bank*, and *Goddard* v. *Merchants' Bank*, is wholly *obiter*, as has been above shown. Judge Sutherland puts the case wholly on authority, and does not discuss it on principle, and he wholly overlooks our point (elaborated below) that we are not within *Price* v. *Neale*, inasmuch as all the negligence in our case is not on the part of the plaintiff. The case of *The Commercial National Bank* v. *The First National Bank of Baltimore*, in the Maryland Court of Appeals, (*Transcript*, *March* 27, 1869,) may be cited as an authority for the defendant. But in that case the defendant did not pay the forger the money *until the plaintiff had paid the check.* The payment to the forger was on the faith of the act of the drawee. Here the Lexington Bank paid the money to the forger before we ever saw the check; and this is the distinction, and a vital one. The case cited merely lays down the law as we admit it to be. It is rather an authority *for* than *against* us. The court say distinctly in the

opinion, "Had the defendant cashed the check at once instead of receiving it on deposit, it certainly would have incurred the risk of loss to itself." This is exactly what the bank did in the case at bar.

XIV. Heretofore we have treated this case as if the draft were a simple case of a forged draft, and we submit that we have shown that principle and good sense, and all the modern authorities are in favor of our right to recover even in that case. But let us now look at the particular facts and circumstances of this case. We claim to have established that the rule of *Price* v. *Neale* is at least not to be extended, and that the tendency of all the later cases, even where they do not overrule *Price* v. *Neale*, is to restrict it by exceptions and distinctions. The cases of the *Bank of Commerce* v. *The Union Bank* (3 *N. Y. Rep.* 230) and *Goddard* v. *Merchants' Bank* (4 *id.* 147) are instances of this tendency. In the first named case it was decided that the drawee may recover the money paid where the alterations are in the body of the bill, inasmuch as the drawee is not responsible for such alterations. Now we shall be told that the principles of the *Bank of Commerce* v. *Union Bank* cannot apply to us at all, because this is not the case of an altered bill, but of a bill forged *de novo*. But let us consider the reasons why this should not be considered the case of a simply forged bill. In the first place it may be reasonably argued that the drawer's signature is to all intents and purposes genuine. "William Ridgely, cashier," wrote his name on this draft with the intention of binding the Ridgely bank to the extent of $14.20, and the Ridgely bank has actually received the $14.20 from the person who bought the draft, and is equitably bound to allow, and has in fact allowed, us to charge them with that amount. The name having been written with the intention of binding the Ridgely bank to the extent of $14.20, the fact that the forger took out the name does not destroy the effect of this intention. Any holder could recover the

$14.20 from the Ridgely bank, certainly in an action for money had and received, if not on the draft, and the draft is an authority to the Park Bank to charge the Ridgely bank with that amonnt. If any person had simply drawn a pen-mark through the name "William Ridgely, cashier," it would not have destroyed it as a binding obligation, and if he had also rewritten the name over the old one, after having drawn a pen through it, it would not have altered the case, or made the pen-mark any more destructive in its effects. Now, erasing the name by acids is only different in degree from simply drawing a pen-mark through it. The signature is only important as evidence of the intention to draw for $14.20. This intention is also evidenced by other parts of the draft—the number of it—and by the mere fact of the giving of it, and may be proved in any way, so that you prove it. The erasure of the signature (provided you supply by other proof, the effect of it, i. e., show that this piece of paper was actually delivered as an obligation for $14.20, which is shown in this case) does not cause the draft to cease to be genuine. Therefore, it is absurd to reason as if this were a forged draft in the drawer's signature; it is a genuine draft for $14.20, altered in the amount, and we are directly within the *Bank of Commerce* v. *The Union Bank.*

XV. But even if we are wrong in this argument, that the drawer's signature, after having undergone the treatment which it has in this case, is wholly equivalent to a genuine signature; yet, we earnestly submit that it would be unjust to consider it as wholly equivalent to a forged signature. If not genuine, it has many elements which make it fall short of a forgery. The defendant claims that all the written parts of the draft having been taken out by the forger, the case is to be considered precisely as if the draft had been written on an entirely new and fresh piece of paper. Now this will not do, for when you bear in mind that the supposed objection to our recovery is the case of

Price v. *Neale*, and that this case is put solely upon the ground of the negligence of the plaintiff, or party paying, it is clear that the court ought to discriminate between the case at bar and a forgery *ab initio*, provided that we show that our negligence is necessarily less in degree, and more excusable, in having paid a draft altered in this way, than if we had paid a simple forgery. The following are some of the reasons why we were not as negligent in paying this altered draft as we should have been in paying a forged draft: In deciding upon the genuineness of a draft, the drawee considers not only the handwriting of the signature, but the engraving of the blank on which it is written, the cancelling stamp, the number of the draft—which was not changed in this case—and, in many cases, private marks on the blank. It is well known that these blank drafts are made by the Bank Note Company, especially for the different banks, and delivered to and carefully kept by them alone, and that the numbers are never duplicated. It may have been that in this very case the plaintiff's teller doubted the drawer's signature, but was reassured by the number or by private marks on the draft. It is not necessary to show that he actually was so reassured, because these things are only mentioned as instances to show how unjust and far from the truth it would be for the court to hold, as the defendant claims they should hold, that this altered draft is to be considered precisely as if it were a forged draft, and the negligence of the plaintiff as great in the one case as it would have been in the other. For the court to decide that there is no difference between an altered check of this kind and an entirely forged check, is to deprive a drawee of the aid of all those means of detecting forgeries. It is to hold that one who pays an altered draft—where all the circumstances above mentioned may have dispelled any doubt which he may have had about the genuineness of the signature—is as careless, and is to be visited by the same consequences, as if he had

paid an entirely forged draft. This cannot be. The defendant assumes that when all the writing was taken out of the draft, it was merely a blank. Not so. The number was left, and, possibly, private marks, and the engraving, revenue stamp, &c., and other points of the bill with which the plaintiff's teller was familiar. It was far short of a mere blank. For the reasons above stated this must be considered, if not a genuine draft as to the drawer's signature, which we have claimed above, and which would at once dispose of this case, yet certainly as an altered and not a wholly forged draft. Then our argument is, that as we are responsible only for the signature of the drawer, and the defendant is responsible for changes in the amount, each must bear the loss arising from these changes respectively; we the original amount, and the defendant the enlarged amount. In other words, we paid this draft in ignorance of three material facts—under three mistakes of fact: as to the signature of the drawer; as to the changes in the amount; and the indorser. We are estopped from denying the former as genuine, but not the two latter. If we are estopped from denying the genuineness of the drawer's signature, the result simply is that the signature of the drawer is to be taken as genuine —is genuine—and this is simply an altered draft, for which alteration the defendant is responsible.

An estoppel never makes a fact more than true. The doctrine that we cannot dispute the signature of our drawer, that we are estopped from denying it, cannot surely have a greater effect than to make true the fact which we are estopped from denying, and yet if the fact were true, i. e., the drawer's signature genuine, we could recover. The defendant seeks to give this mysterious effect to the doctrine of estoppel: that it does not merely make true the fact which we are estopped from denying—that is, make the drawer's signature genuine—but also has

the effect to excuse all its negligence in not detecting the alterations for which it was responsible.

Again, I have a perfect right to recognize the signature of a drawer as a genuine one, (although I know it to be forged,) without subjecting myself to any other loss than legitimately belongs to the falsity of the signature. For instance, suppose a drawee knows that the forgery (of the name of the drawer) is by his (the drawee's) own son, and chooses to adopt it, and pay the draft, rather than expose him; cannot he do this without also adopting an alteration in amount which some other forger has chosen to put on it subsequently? I suppose there would be no doubt of this. Now, in our case, it is probable that both the forgery or alteration of the signature of the drawer, and the alteration in the name of the payee and the amount, were made by the same persons, (though this does not appear;) but this certainly cannot change the principle.

XVI. But we are not within the doctrine of *Price* v. *Neale* at all. Considering this draft as what it is, a draft altered in three respects, let us see what are the consequences which follow. It is a well settled principle of law that every person who transfers a piece of mercantile paper, or any other chattel to another, impliedly warrants that it is genuine, and what it purports to be. This is so, whether the party transferring indorses the paper or not. (*Gibbs, Ch. J., in Jones* v. *Ryde*, 5 *Taunt.* 488. *Gompertz* v *Bartlett*, 24 *Eng. Law and Eq.* 158. *Young* v. *Cole*, 3 *Bing. N. C.* 730.) Although there is not always an implied warranty as to quality, there is always such a warranty that the thing purported to be conveyed has an existence—that it is what it purports to be. For instance, that what purports to be a horse, is a horse; that the horse purported to be conveyed is in existence; that what is transferred, as the note of John Doe, was made by John Doe, &c. That the genuineness of the drawer's signature is not guaran-

tied as against the drawee is an exception to the general rule; but even the genuineness of the drawer's signature is vouched for by the transfer, as against every one, except the drawee; and this exception rests upon peculiar grounds. But the *Bank of Commerce* v. *The Union Bank* shows that the exception extends no further than the drawer's signature, and does not extend to the body of the instrument. As to the body of the instrument, the general rule prevails that a transfer warrants its genuineness. The distinction between a warranty as to quality, which is not impliedly made by the mere act of transfer, and a warranty of the genuineness or the existence of the article, may be illustrated thus: The transferrer does not warrant by the mere act of the transfer, that the note is good, i. e., will be paid; but he does warrant that John Doe made it. Now, bearing in mind the undeniable fact that the defendant, as holder and transferrer, was responsible for the genuineness of all parts of this draft, except the drawer's name, and as between it and us was bound to know of any alterations in it, it follows that we do not come within the case of *Price* v. *Neale* at all. That case rests on the fact that "all the negligence was on the part of the plaintiff or party paying;" and Ch. J. Abbott decides, in *Wilkinson* v. *Johnson*, (as quoted, *supra*,) "That where there is any fault in the party receiving, and he cannot be said to be wholly innocent, he ought not to profit by the mistake into which he may by a prior mistake have led the other." And Byles says, in the extract quoted *supra*, "Where the fault is not wholly on the part of the party paying, he may recover." Therefore, it is only necessary to show here that some part of the negligence is on the part of the defendant. In this case the defendant is chargeable with negligence in not detecting the alterations in the body of the draft, and, therefore, "all the negligence" is not on our side. By negligence, in all these cases, is meant not negligence in fact, but, rather,

negligence in law, i. e., an omission to discover that which the law says one is bound to know. No evidence of the nicety of the forgery, that it was so exquisite that the drawer himself could not detect it, and that therefore there was no negligence in fact, will enable the drawee to recover under *Price* v. *Neale*. This shows that the negligence is negligence in law—an omission to discover what one is bound to know. Now it is clear that the holder guaranties the genuineness of the body of the draft, and therefore he is bound to know that it is correct. Is it not an absurdity to say that one is not bound in law to know the correctness of a fact which the law says he guaranties? The holder being thus bound to know that the body of the bill is correct, his omission to inform himself on the subject is precisely the same kind of negligence that the drawee is guilty of. The body of the bill had undergone exactly the same treatment that the drawer's name had. Therefore, we repeat, all the negligence in this case is not on the part of the plaintiff. Now, when the defendant received this piece of paper and brought it to us, it guarantied to us the genuineness of the body of the instrument, and in contemplation of law it was bound to know if anything were wrong about it. It was negligent before we ever saw it. It came to us chargeable with a negligence prior to ours in point of time. It came to us in default, as it were, and it cannot now invoke, to save itself from a recovery by us, the principle of a case—*Price* v. *Neale*—where "all the negligence was on the part of the plaintiff."

XVII. Now, the defendant will say, that although it is true that if the drawer's signature had been genuine, the defendant would have been bound to repay to us the money paid, because it is responsible for alterations in the body of the instrument, yet the rule does not apply where the drawer's name is also forged. Let us see how much reason there is in any such restriction of the rule.

Did the defendant become any less liable for its omission to discover the changes in the body of the bill, because we too made a mistake as to the drawer's name? Shall our mistake excuse its? If our mistake as to the drawer's signature had been the cause of its, or had had any tendency to mislead it as to any point on which it was bound to inquire, there would be some sense in saying that our mistake excused its, otherwise not. But our mistake was after its. It had failed to detect the alterations in the body of the bill before we ever saw it. Its passing over the alterations without discovering them, deceived us, instead of ours having deceived it, because we were certainly influenced by the fact that the paper had come through its hands without any wrong being detected. Our mistake having occurred after its, surely had no effect on its judgment in the premises, nor any tendency to throw it off its guard.

XVIII. If it be said that had we done our duty, and detected the forgery of the drawer's signature, the draft would not have been paid at all, and there would have been no loss, we answer that had the defendant and those behind it done their duty, and detected the alterations in the amount and payee when the draft first came into their hands, there would have been no loss at all, for the whole swindle would have been detected at the outset. The legal effect of the whole transaction is this: The defendant comes to us with this draft, and says (as the law implies) "it is all right as to the body thereof; is the signature correct?" We thereupon say, "the signature is correct." It appearing afterwards that we are both wrong, the defendant coolly says, "you misled us; you ought to have detected the forgery of the drawer's name; you were negligent, and you must bear the loss." Did not it mislead us? Did it not say that the body of the bill was all right? Was it not negligent? And is it not somewhat impudent for it to invoke in its behalf a case wherein "all the neg-

ligence was on the part of the plaintiff." The only logical and fair adjustment of the loss is to hold that each must be responsible for the loss occasioned by the alterations for which they respectively are responsible—we for the original amount, and the defendant for the enlarged amount.

XIX. The defendant's argument is this: It admits that had the signature of the drawer been genuine, we could undoubtedly have called the defendant to account for the alterations in the body, on the doctrine of the *Bank of Commerce* v. *Union Bank*, (*supra*,) but the drawer's name being forged, we cannot, they say, raise any objection to the rest of the bill. Now, we have clear authority for the position that the forgery of the name of the drawer does not preclude the acceptor, or party paying, from disputing any other point about the bill. In 2 *Parsons on Bills*, 590, it is said: "If the drawer's signature be forged, the acceptor must yet pay the bill; but if he suspect some indorsement to be spurious, he may yet (i. e., in spite of the drawer's signature being forged) require the holder to show title through a genuine transfer." In *Beeman* v. *Duck*, (11 *Mees. & Wels.* 251,) the defendants accepted a bill purporting to have been drawn on them by Bradshaw & Williams, to the drawer's own order. Bradshaw & Williams were a real firm, and the signature of both the drawers and indorsers were forgeries. It was *held*, that where the party purporting to be the drawer was a real person, (not fictitious,) the acceptor, although he was estopped from setting up the forgery of the drawers named, could question the indorsement. In *Cooper* v. *Meyer*, (10 *Barn. & Cress.* 468,) Lord Tenderden says the same thing of cases where the drawer is a real person, but makes a distinction in the case of a bill drawn and indorsed by a person having no real existence. This distinction is no doubt proper, because one who accepts a bill of course knows whether the drawer is a real person; and

if he accepts a bill drawn in a fictitious name to the order of the drawer, it is reasonable to hold, as was done in *Cooper* v. *Meyer*, that he undertakes to pay on an indorsement in the hands of the same person who appears as drawer. But in our case, to use the words of Baron Parke, in *Beeman* v. *Duck*, "the drawer really existed, though his signature was forged." Though the points disputed in the cases above cited were the indorsements, yet the principle applies as well to changes in the amount—the principle above settled being that the fact that the drawer's signature is forged, does not prevent the acceptor or drawee from questioning such other parts of the bill as he could have questioned had the drawer's name been genuine; in other words, that the fact that the drawer's name in this case is a forgery, or not genuine, does not prevent us from raising the same objections, based upon the alterations in the body of the bill, which we otherwise could do.

XX. We respectfully ask that a decision be given upon all the points presented, to wit: 1st. That where there has been any negligence on the part of the party receiving, the plaintiff may recover; i. e., that the loss must fall where the first negligence in point of time has been. 2d. That even where all the negligence is on the part of the party paying, we may recover unless actual damage has occurred from change of circumstances. We ask the court to complete the work which other courts or text books have partly done, and to authoritatively upset, or rather modify, the doctrine of *Price* v. *Neale*. 3d. That even if both these propositions are wrong, yet this is an altered draft, wherein the signature is genuine to all intents and purposes for $14.20, as originally drawn. 4th. And even if it be not a genuine signature of the drawer, yet we are only responsible for the original amount, and the defendant for the alterations. That the

case comes within the *Bank of Commerce* v. *Union Bank.* That it does not come within *Price* v. *Neale,* because "all the negligence is not of the plaintiff."

J. H. V. Arnold, for the respondent.

INGRAHAM, J. I agree that the drawee of a draft is bound to know the handwriting of the drawer; and when he pays a draft on which the name of the drawer has been forged, he is bound to bear the loss to the same extent he would have been if the signature had been genuine. But the liability extends no farther; and where the genuine draft has been altered, not only in the name, but in the amount to be payable, I do not think that rule should hold the drawee liable for any more than the amount of the original draft; and for the balance the plaintiff should recover.

It must be a very rare occurrence, that a genuine draft should have the name of the drawee removed, and then forged to the same instrument; but I think the rules, as heretofore settled, viz., that the drawee is bound to know the handwriting of the drawer, and is liable for a draft which he pays, although forged; and the other, that where the body of the draft is altered, the drawee may recover the amount from the person receiving it, may both be applied to this case, and should lead to the result before stated.

I am therefore in favor of reversing the judgment.

CLERKE, P. J., concurred.

SUTHERLAND, J., (dissenting.) I have nothing to add to my opinion below, in this case, except this: The case of *Jenys* v. *Fawler* (2 *Str.* 946) was alluded to by the counsel for the plaintiff in *Price* v. *Neale,* as reported in 3 *Bur.*

1354, and 1 *Black.* 390; and from what Lord Raymond said in that case, it is probable that the rule in *Price* v. *Neale* was really adopted on the ground of public policy; that is, that the adoption of the rule was calculated to promote the negotiability of commercial paper, by promoting confidence in its genuineness.

Judgment reversed, and demurrer overruled.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Ingraham* and *Sutherland*, Justices.]

BELL V. LITTLE *vs.* MARTIN WILLETS.

A gift of money from a husband to his wife, which she immediately returns to him with instructions to use it as her agent, cannot be sustained, as against the husband's creditors.

Nor can the wife maintain title to personal property, upon the allegation that it was purchased by her husband as her agent, with the proceeds or profits of money given to her by him.

The statutes of this state do not enlarge the common law rights of the wife, in this particular. The acts of 1848 and 1849 enable a married woman to take by gift &c. from any person *other than her husband*, and the acts of 1860 and 1862 declare the nature or qualities of the estate which married women may acquire, and enable them to sue, &c.; but these acts do not, in terms or by implication, designate the husband as a person from whom the wife may take, &c.

No gift *inter vivos*, will confer title unless there be a positive change of possession, and the donor is in no position to repossess himself of the subject matter of the gift, or to recall the same.

APPEAL from a judgment entered upon the report of a referee.

The action was brought against the defendant, as undersheriff of Suffolk county, to recover the possession of certain articles of personal property levied on by him under an execution against the property of the plaintiff's husband, Robert H. Little.

The referee found the following facts: 1. That the plaintiff is, and for more than seventeen years has been, the wife of Robert H. Little. 2. That for fifteen years previous to and including the year 1865, her said husband was accustomed to give her, each year, a holiday gift, in money—in some years $500, in other years $300. 3. That excepting portions of this money used in paying for articles purchased for herself, she delivered the same to her husband, with directions that he should invest the same for her, and as her agent. 4. That he did invest and reinvest the same, together with the profits thereof, in various gold, petroleum and oil stocks. Mrs. Little was kept advised of these transactions, made occasional memoranda of some of them, but kept no accurate account of the whole. 5. That in the spring of 1866, Mrs. Little became the owner of a farm at Huntington, Suffolk county, on which she and her husband and family then went to reside, and where they have since resided. 6. That in 1866, Mrs. Little purchased and placed on the farm, through the agency of her husband, the following articles, mentioned in the complaint, viz: the skeleton wagon, the two-seat wagon, the calash-top wagon, the bay horse, the cow, grindstone and flat-boat. Her husband, in purchasing these articles, professed to act in behalf of his wife, and paid for them out of the funds above mentioned. The calf mentioned in the complaint was raised from the cow mentioned. The hay and stalks mentioned were grown upon the farm. 7. That in 1867, Daniels, Crozier & Coe obtained a judgment in the Supreme Court, against Robert H. Little, on which an execution was issued; and the defendant, undersheriff of Suffolk county, by virtue thereof, levied on the articles mentioned in the complaint. 8. That the articles were immediately replevied by the plaintiff. 9. That the value of the articles, other than the hay and stalks, is $460, and of the hay and stalks, $40.

And as conclusions of law, the referee found, 1. That

by the common law, Robert H. Little had no power to confer upon his wife, the plaintiff, a title to this money by a delivery thereof into her possession in the form of a gift, and that she had no legal capacity to acquire a title to such money, in that manner. 2. That the statutes of this state have not altered the law, in this respect; the statutes of 1848 and 1849 expressly disclaiming this mode of creating a sole and separate estate in the wife; and the statutes of 1860 and 1862 not enlarging the means by which such estate may be created, but declaring the qualities of such estate when acquired in accordance with existing laws. 3. That the money delivered by Robert H. Little to his wife, the plaintiff, remaining by force of law his property, the proceeds thereof, and the articles purchased therewith, with the calf raised from the cow thus purchased, were all his property; and that the facts raised no equity in behalf of the plaintiff herein which can countervail the claims of an execution creditor of the owner. 4. That the defendant had authority to take those articles, and that he therefore should have judgment for the return thereof; or, in default of a return, for the sum of $460, with interest from the date of the replevy, to wit, from the 24th of January, 1868. 5. That the plaintiff was the owner of the hay and stalks mentioned in the complaint, and that she have judgment for six cents damages for the taking and detention thereof.

Judgment being entered accordingly, the plaintiff appealed.

Henry C. Platt and *C. C. Egan*, for the appellant.

Thos. Young, for the respondent.

By the Court, TAPPEN, J. The plaintiff is a married woman, and for a period of fifteen years, previous to, and including the year 1865, her husband had given her holi-

day gifts of money, amounting in the aggregate to about $15,000. These moneys she instructed him to use, as her agent. He did so use and invest them in various stock transactions, and kept a separate account thereof. On a judgment recovered against the husband, the defendant, under-sheriff, made a levy upon a wagon, and other personal property, in June, 1867. This personal property was upon a farm of the plaintiff's on which the plaintiff and her husband resided. The plaintiff brought this action of replevin, and claims that the property was purchased by her husband as her agent, with moneys acquired as above stated, or with the increase or profits of such moneys; that such property was in her possession and use upon the farm, and that her husband was solvent at the time of the purchase of the property. The defense is principally based upon the legal proposition that the wife could acquire no property by gift from her husband; and the referee before whom the case was tried so found, and reported in favor of the defendant. I do not, however, upon the facts of the case, assume that there was any gift—that is, a gift of any property of which the wife retained possession or control, or which was placed in such condition as to render it capable of being distinguished from other property of the donor.

I am not prepared to hold that a gift like the one in question confers any title upon the wife, or would confer any title upon any other person as donee, against third parties. A different conclusion might be reached if it were a return of the wife's money to her; or if she retained some control of the property which is the subject of the gift; or if it were property capable of being distinguished; but to hold that a wife may immediately return to her husband money that he had given her, with instructions to use it as her agent, and that she may maintain title to personal property upon the allegation that it was purchased by her husband as her agent with the proceeds or profits

of those gifts, is to leave the entire business community without suitable protection.

It does not appear but that in this case the "agent," the husband, has all that his wife has entrusted to him, and can fully account to her therefor.

In respect to the separate account kept between them, the only account produced upon the trial was one made by the husband's book-keeper, and commencing in June, 1865.

The wife was a witness upon the trial; the husband was not called.

I have not thought it necessary to consider whether the creditor upon whose judgment and execution the levy was made was a prior or subsequent creditor; nor does the question of the right of the wife, in equity, to have an account from the husband, need to be considered here. If her husband were simply her debtor, then his gifts did not constitute a separate estate, in the sense which is necessary to maintain this action. The appellant cites *Dygert* v. *Remerschnider*, (32 *N. Y. Rep.* 629,) in which the right of the wife was upheld; but in that case the wife had paid full value to the husband's creditors. The appellant also cites *Wallingford* v. *Allen*, (10 *Peters*, 594,) in which Justice WAYNE says: "Where the husband is in a situation to make a gift of property to the wife, and *distinctly separates* it from the *mass* of his property, for her use, equity will sustain it," &c. I hold the latter feature to be wanting in this case.

No gift *inter vivos* is sustained as conferring title unless the change of possession be positive, and the donor in no condition to repossess himself of the subject matter of the gift, or to recall the same. The legislation in this State, referred to upon the argument, does not enlarge the plaintiff's rights or remedy.

The statutes of 1848 and 1849 enable a married woman

to take by gift &c. from any person other than her husband, and the subsequent acts of 1860 and 1862 declare the nature or qualities of the estate which married women may acquire, and enable them to sue, &c. These acts do not in terms, or by implication, designate the husband as a person from whom the wife may take, &c.

The judgment should be affirmed, with costs.

[KINGS GENERAL TERM, February 8, 1869. *J. F. Barnard, Gilbert* and *Toppen*, Justices.]

CAROLINE A. DAVIES *vs.* THOMAS DAVIES.

55 130
82h 184

Under our statute, (2 *R. S.* 186,) a limited divorce, or separation from bed and board, may be granted to a married woman for cruel and inhuman treatment by the husband, and also for such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to cohabit with him.

But husband and wife should not be lightly separated, or without good cause.

It is the duty of the wife to live with her husband, and put up with his illnature and petulance, and bear with his infirmities, if she can do so with safety to her person, and without great personal apprehension and discomfort.

What circumstances were held sufficient, in this case, to warrant a decree for a limited divorce, in favor of a wife, on the ground of cruel and inhuman treatment.

If a wife continues to cohabit with her husband for several months, after receiving from him such treatment as would justify her in applying for a separation, this implies a forgiveness of the ill treatment, and a purpose to continue conjugal relations with her husband. And after such a lapse of time and such condonation, the court will not grant a divorce for such ill treatment if in the interval the husband has treated his wife kindly, and given her no further cause of complaint.

But if she has occasion to complain of his treatment, afterwards, she may refer to such ill treatment, and bring the same forward as a part of her grounds for believing that she cannot safely continue to cohabit with him, Under such circumstances, her case rests upon a review of all his conduct towards her during their married life, and not upon any single act.

The question in this class of cases is, had the plaintiff reasonable ground of apprehension in regard to her personal safety? Had she any ground to be-

lieve that she was exposed to any physical injury by a continuance of her cohabitation with her husband?

There must be, in all cases, ill treatment and personal injury, or a reasonable apprehension of personal injury. Words of menace, accompanied by a probability of bodily violence, are sufficient.

THIS was an action brought by a wife against her husband for a limited divorce. The parties were married in February, 1863. Previous to the marriage the plaintiff had been the defendant's housekeeper. There were no children born of the marriage. No difficulty occurred between the parties until about January, 1866, when a young woman, known to both parties, came to their house as a visitor. Soon after her arrival, the plaintiff saw, or suspected, a too close intimacy between this young woman and her husband, the defendant. This gave rise to much difficulty, and the plaintiff repeatedly remonstrated with the defendant on the subject, and at times made somewhat harsh accusations of adultery between them. Several acts of intimacy, not amounting to proof of adultery, were sworn to by the plaintiff on the hearing before the referee who took the testimony in the case. From this time there were estrangements and repeated quarrels between the plaintiff and defendant, on the subject of this young woman, the plaintiff insisting that she should leave the house, and the defendant insisting upon her staying to conclude her visit. During these altercations, violent and unseemly language was frequently used by both parties, the defendant using profane and in some instances indecent language towards his wife, calling her unchaste, and reproaching her on account of her homeliness and unattractive appearance, as he termed it. She retorted, accusing him of illicit intercourse with the young woman in question, of attemping to poison her, the plaintiff, and at times, when excited, by his actions and language, used improper language, calculated to irritate and provoke. The defendant, several

times, threatened her life, and used personal violence towards her. This state of affairs continued until July, 1866, when it culminated in a serious quarrel between the plaintiff and defendant, during which the latter choked the former, committed severe personal violence upon her, and struck her a blow with his fist, upon the left temple, severing the temporal artery, and endangering the plaintiff's life.

The plaintiff, after this, continued to live and cohabit with the defendant, but their relations were by no means pleasant or agreeable. For a few days, at intervals, they would live quiet and peaceably, when the smouldering fires would again burst forth, and violent and abusive criminations and recriminations were the result. He, at times, would continue his threats of personal violence, and apply to the plaintiff opprobrious names and epithets, and she would repeat her charges of adultery, and reply to the defendant in harsh terms. So they lived together down to October, 1866, when, one Sunday morning, they had another quarrel, during which the defendant raised his boot, and threatened the plaintiff that "if she did not go out of the room pretty lively he'd knock it over her head." The defendant at this time also conducted himself in a very violent and abusive manner towards the plaintiff, telling her she should go to state's prison, and shaking the coffee-pot in her face; using at the same time profane and abusive language towards the plaintiff, saying "he wanted nothing more to do with her; that if it was not Sunday he would throw her out of doors; that he would throw or boot her friends out of the house, if they came to see her," and conducted himself with great violence and impropriety. On the Tuesday following, the plaintiff left the defendant's house, and went to her brother's to reside. She testified that she had "given up all hope that there was any safety or peace of mind any further."

John C. Chumasero and *C. C. Davison*, for the plaintiff.

J. H. Martindale, for the defendant.

E. Darwin Smith, J. It is perfectly evident, I think, from the proofs in this action, that the parties cannot live peaceably together and perform their proper conjugal duties towards each other. The spirit and temper of both of them forbid it. The defendant had confessedly lost all attachment and respect for his wife, and clearly desired to be rid of her, before she left him. As they must, therefore, live apart hereafter, the question presented to the court is, whether such separation can and ought to be legalized, so as to permit them to live thus apart, without further strife and in apparent decency and quiet. It is the duty of the wife to live with her husband and put up with his illnature and petulance, and bear with his infirmities, if she can do so with safety to her person and without great personal apprehension and discomfort. Husband and wife should not be lightly separated, or without good cause.

Under our statute, a limited divorce, or separation from bed and board, may be granted to a married woman for cruel and inhuman treatment by the husband, and also for such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him. (2 *R. S. chap.* 8, *part* 2, *art.* 4, *p.* 186.)

I think there can be no doubt that the defendant's treatment of his wife on the 23d day of July, 1866, as they both describe the scene and transaction, was such cruel and inhuman treatment as would warrant a divorce, according to all the cases. (*See Burr* v. *Burr*, 10 *Paige*, 20; *Whispell* v. *Whispell*, 4 *Barb.* 220; 17 *Abb.* 21.) But the plaintiff continued to cohabit with the defendant, afterwards, until about the last of October, 1867, when she left his house—a period of about fifteen months. This con-

tinued cohabitation for so long a period after the ill treatment of July, 1866, implies a forgiveness of such treatment, and a purpose to retain here conjugal relations with the defendant, and to trust to his good treatment for the future. After such a lapse of time and such forgiveness, the court would not grant a divorce for such ill treatment, if, in the interval, the defendant had treated his wife kindly and given her no further cause of complaint. The wife must, under such circumstances, be deemed to have elected to abide with her husband and trust to his assurances of amendment and future good treatment. But if she has occasion to complain of his treatment afterwards, she is not debarred the right to refer to such ill treatment, and bring the same forward as a part of her ground for the belief that she cannot safely continue to cohabit with him. Her case rests upon a review, under such circumstances, of all his conduct towards her during their married life, and not upon any single act.

The question, at all times, in this class of cases, is, had the plaintiff reasonable ground of apprehension, in regard to her personal safety, at the time she left her husband? Had she any ground to believe that she was exposed to any physical injury by a continuance of her cohabitation with her husband? (1 *Bishop on Mar. & Div.* §§ 715, 716, 717.) There must be in all cases ill treatment and personal injury, or a reasonable apprehension of personal injury. (*Whispell* v. *Whispell*, 4 *Barb.* 219.) Words of menace, accompanied by a probability of bodily violence, will be sufficient. (*Id.*)

The testimony of the wife, in this case, if believed, I think fully establishes the fact that the plaintiff was more or less exposed to personal violence during her cohabitation with the defendant from the time of her recovery, after the injury inflicted upon her by the defendant, in July, 1866, until she finally left him. She testified that he made frequent threats of personal violence. He threat-

ened, at one time, to pitch her out of the sleigh, if she got in, and give her a horse-whipping.

On Sunday evening, before she left him, she says, "he raised his boot, and said 'if I did not go out of the room pretty lively, he would knock it over my head.'" On the same morning, at breakfast, after some conversation about the "young woman," Helen, who seems to have been the chief cause of the jealousy, suspicion and trouble between these parties, she says: "he jumped up, and took the coffee-pot, and commenced shaking that in my face." She also testifies that, on this occasion, he also said "he didn't want to have anything more to do with me." He also said "if it was not Sunday morning, he would throw me out of doors."

These instances of assault and menaces, and threats of personal violence, tend to prove that he was capable of using such violence upon her person, and gave, I think, ground of reasonable apprehension, on her part, that she might suffer personal injury if she continued to cohabit with him.

It is true the defendant denies much of this testimony, but I am inclined to think that I should rather believe the plaintiff than the defendant, when their testimony comes in conflict, and for the reason that her statement is affirmative, and his simply denial, and also that he admits much that tends to corroborate her statements. He admits the personal violence used in July, 1866, and the use of frequent harsh language towards her, and the threat to throw her out of the sleigh. I also prefer crediting the wife's statement, for the reason that the testimony, upon the whole, shows that the husband possessed a violent temper, and had clearly lost all affection for his wife, and wished to be rid of her, and was just in that frame of mind, when she left him, to do what she says he threatened to do. This view is strongly confirmed by the letter

produced, which he wrote soon after she left him, and when his passions were not excited by any immediate provocation on her part. In that letter to her brother, he writes that he proposes to commence a suit in the courts, for a divorce; and says, also: "I have made up my mind the foolish, simple, but black-hearted woman will never live with me again." This letter is dated November 11, 1867, and must have been written ten days or two weeks, probably, after the plaintiff left the defendant's house.

It is quite apparent that the plaintiff did not behave well herself—that her language and conduct were in many particulars unbecoming and provoking. Perhaps, however, it was about such language as might be expected from a woman in her situation and grade of life, and of her state of refinement, rendered jealous, and aggravated by the defendant's treatment of her in keeping another and a handsomer woman in the family, under the circumstances detailed in the evidence, and a woman, too, whom he seemed to admire and treat with more kindness and attention than his wife. Many of the plaintiff's fears and suspicions were undoubtedly groundless, but they were probably honestly entertained, and were caused by him, and were rather fostered than allayed by his conduct towards Miss Button, in the presence of his wife.

Upon the whole case, and a review of his whole conduct towards the plaintiff during the period of their entire cohabitation as husband and wife, I think I must find that his treatment of her was cruel and inhuman; that she had, when she left him, reasonable ground of apprehension of personal injury in case she continued to cohabit with him; and that her conduct towards him was not sufficiently culpable to debar her of her right to a divorce from bed and board, and a suitable provision for her support. I must therefore so decree, and direct a reference to some

member of the bar, to ascertain what would be, under the circumstances, a suitable provision to be made by the defendant for her support and alimony.

[LIVINGSTON SPECIAL TERM, April 26, 1869. *E. D. Smith*, Justice.]

BOSTWICK *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY.

Where a bill of lading is made out by the carrier and delivered to, and accepted by, the shipper, all previous parol agreements are merged in it, and the shipper, by such acceptance, becomes bound by its terms.

If a carrier has acted under a bill of lading as delivered to the shipper and accepted by him, and a loss occurs from one of the perils mentioned in such bill, as exempting the carrier from liability, no recovery can be had therefor.

Where, by a bill of lading, goods were to be transported from Cincinnati to New York, over certain specified railroads, to Belle Air, "and there delivered to the agents of the next connecting *steamboat*, railroad company or forwarding line," &c.; *Held* that the bill of lading was conclusive evidence as to the contract which the carrier made; and that under it the carrier was not bound to carry entirely by railroad.

THIS action was brought to recover the value of sixteen bales of cotton, (being part of fifty-four bales,) shipped by the plaintiff from Cincinnati to New York, to be transported, as the plaintiff claimed, by the defendant upon its railroad and other connecting railroads, as a common carrier.

The plaintiff alleged in his complaint that the defendants were and are a corporation, and acted, and are acting, as common carriers of passengers and property for hire. That as a part of their said business, the said defendants had, and still have, a connection with the Little Miami Railroad Company, the Columbus and Xenia Railroad Company, and the Central Ohio Railroad Company, and other railroad companies; each of said companies being

then, and still being, a corporation and common carrier for hire of both passengers and freight, in such a manner as to form and make a continuous railroad connection from the city of Cincinnati to the city of New York. That each of said several railroads, and its agents, were, and still are, the agents of the defendants, and of each other. That on or about the 15th day of November, 1865, the plaintiff made a contract with the defendants, through their agent, G. F. Cooke, who represented the defendants and said other railroad companies, for the transportation of fifty-four bales of cotton, from said city of Cincinnati to the city of New York, entirely by railroad, and over and upon the defendants' railroad, and for its delivery in the city of New York, and that the plaintiff paid the defendants the entire freight for such transportation, and the defendants entered upon the performance of said contract. That the defendants failed to perform said contract on their part, and failed to transport and deliver sixteen bales of said cotton at the city of New York, although such delivery had been demanded of them, but converted said sixteen bales of cotton, containing seven thousand, seven hundred and eighty-eight pounds, or thereabouts, being of the value of five thousand dollars, or thereabouts, to their own use, to the plaintiff's damage of five thousand dollars. Wherefore the plaintiff demanded judgment against the defendants for the sum of five thousand dollars as damages, besides costs and disbursements.

The defendants, by their answer, denied: *First.* That as a part of their business, they formed and had, and still have, a connection with the Little Miami Railroad Company, the Columbus and Xenia Railroad Company, and the Central Ohio Railroad Company, and the other railroad companies, in such a manner as to make and form a continuous railroad, connecting from the city of Cincinnati to the city of New York, as alleged in the complaint; and they also denied that each of said several railroads,

and its agents, or either of them, were or still are the agents of the defendants, and of each other, as also alleged in said complaint. *Second.* The defendants denied that on the 15th of November, 1865, the plaintiff made a contract with them, through their agent, G. F. Cooke, representing the defendants, and said other railroad companies, for the transportation of fifty-four bales, or any other quantity of cotton, from the city of Cincinnati to the city of New York, but, denying that the Little Miami Railroad Company, or the said G. F. Cooke, were, or are, agents of the defendants, they admitted that at the time aforesaid, the said last named company, or the Central Ohio Railroad Company, did, through G. F. Cooke, the agent of the said last named companies, or one of them, at Cincinnati aforesaid, contract with the plaintiff to transport fifty-four bales of cotton from that city to the city of New York, by the said Little Miami and Columbus, and Xenia, and Central Ohio roads, and by these defendants' roads, upon the stipulations as to liability of said several companies, contained in a bill of lading, which, as the defendants believed, was signed by said G. F. Cooke, as agent of said Little Miami, and Columbus, and Xenia, and Central Ohio roads, or of one of them, and by him delivered to said plaintiff, and by which it was, among other things, stipulated that in case of loss or damage to said cotton, in course of transportation, by which a legal liability or responsibility should be incurred, that company alone should be held accountable therefor, in whose actual custody the same might be at the time of the happening of such loss or damage; and that the carrier so liable should have the full benefit of any insurance that might have been effected upon or on account of said cotton. And the defendants alleged that in the transportation of said cotton, the road of the defendants, commencing at Benwood, on the Ohio river, and terminating at the city of Baltimore, was used by said other roads or road so contracting with the plain-

tiff, as a connecting road, the defendants' road connecting with the said Central Ohio road at Benwood aforesaid; and the defendants undertook to carry said cotton from said Benwood to the city of New York, on the terms and stipulations contained in said bill of lading, and on no other, and in the usual and customary way of transporting goods received by them for transportation to the city of New York. That the usual and customary way or mode of transportation by the defendants, of goods received by them on their road, destined to the city of New York, after their arrival at Baltimore, is, in the absence of an agreement to the contrary, to transport the same by sea, by a line of steamers employed by them between said cities, and this custom was well known to the plaintiff. That in the present instance no agreement was made between the plaintiff and themselves, or between themselves and the other roads, or either of them, to transport said cotton from Baltimore to New York by railroad, or in any other than said customary way; and they denied the allegation in the complaint, that they agreed to transport said cotton from the city of Cincinnati to the city of New York, entirely by railroad. They alleged that the said cotton, on its arrival at Baltimore, was shipped by them by said line of steamers, in due course of transportation, to the city of New York, and according to their usual course of business; and the said sixteen bales of said cotton, claimed in this action, were lost at sea by the dangers of navigation, to wit, by shipwreck of the steamer Alleghany, in which they were, during the transportation thereof in said steamer, which constituted one of said line of steamboats between the cities of Baltimore and New York, on their passage to the latter city; and the defendants alleged that by the express terms of said bill of lading and contract aforesaid, the defendants were exempted from liability for losses or damage to goods transported by them, by the dangers of navigation while in seas, rivers, lakes

or canals, by reason whereof the defendants claimed that they were not liable to the plaintiff for the damages claimed in this action, or for any damages whatever. And the defendants, for a further defense, alleged, on information and belief, that the plaintiff effected insurance on said cotton, but that said insurance did not cover the risks of its transportation by sea as aforesaid, wherefore the plaintiff was unable, in the event of a recovery against the defendants, to give to them the benefit of said insurance, as by the stipulations of said bill of lading or contract he was bound to do. The defendants denied that they had converted said sixteen bales of cotton to their own use, and demanded that the complaint be dismissed, with costs and allowances to them.

On the trial, before Justice MORGAN and a jury, the plaintiff, being examined as a witness, testified that he made an arrangement with one Grant F. Cooke, in Cincinnati, between the 12th and 15th days of November, 1865, for the transportation of fifty-four bales of cotton from the city of Cincinnati to the city of New York, by the defendants' line of railroad, in connection with the Little Miami, Central Ohio, and Xenia roads. That Cooke represented himself to be the agent of these roads. That the cotton was to go *all the way by rail*, and the plaintiff agreed to pay all rail freight. The cotton was sent to the depot at Cincinnati for shipment, and the receipts therefor sent by the plaintiff to Cooke's office for the bill of lading, which was sent to the plaintiff the next day or the day after. These receipts were not produced, but the bill of lading was in evidence. It does not state that the cotton was to go by *all rail*. It acknowledges the receipt of fifty-four bales of cotton, "to be transported by the Little Miami, and Columbus, and Xenia railroad companies, to Columbus, and there delivered to the agents of the Central Ohio Railroad, and by them transported to Belle Air, and there delivered to the agents of the next

connecting steamboat, railroad company or forwarding line, until the said goods or merchandise shall have reached the point named in this bill of lading." The bill of lading contained a clause exempting the defendants from liability "for loss or damage by fire, collision, or the dangers of navigation, while in seas, rivers, lakes or canals;" also this clause: "In accepting this bill of lading, the shipper or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions." It was customary for the defendants, on goods arriving at Baltimore, to send them on to New York, either by steamer outside, or by sea, or by rail; and it was claimed that they were governed in their action in this respect by the directions of the bill of lading, one of which is usually forwarded with the goods. In this instance the defendants shipped the cotton, on its arrival in Baltimore, by the steamer Alleghany, and sixteen bales were lost by the stranding of the vessel outside of the harbor of New York. It is for this loss the present action is brought. The defense was that the defendants never contracted to carry the cotton other than according to the terms of the bill of lading; that the bill of lading did not direct them to forward the goods "all rail;" that they sent the cotton by the customary way—by sea—in the absence of an agreement to the contrary, and that by the express terms of the bill of lading they are exempted from losses by the dangers of navigation at sea. The bill of lading was dated 15th November, 1865, and it seems that on the same day, after getting his bill of lading, the plaintiff effected insurance on the cotton, in Cincinnati, *all rail* to New York. This latter evidence, and a great portion of the whole evidence, was taken under the defendants' objection and exception.

At the close of the plaintiff's evidence, the defendants' counsel moved to dismiss the complaint upon the following grounds: 1st. "That it has not been proved that Mr. Cooke

could make any bargain for the defendants. 2d. That the bargain, whatever it was, was reduced to writing, and in the form of a bill of lading, and by that the rights of the parties are to be governed. The bill of lading is a binding contract, and cannot either be contradicted or supplied by parol proof; that by the terms of the bill of lading, the defendants had the right to send said cotton from Baltimore to New York by sea; and that by the terms of the bill of lading, the carrier was not responsible for losses by peril of the sea." The plaintiff's counsel replied: "It is in proof here that the plaintiff's attention was never called to the printed part of the bill of lading, which the defendants claim amounts to a contract;" and he asked the court to submit the questions of fact in the case to the jury, which the court refused, and the plaintiff excepted. The plaintiff's counsel asked the court to direct the jury to find a verdict for the plaintiff, which the court refused, and the plaintiff excepted. The defendants' motion to dismiss the complaint was granted, with direction that the exceptions be heard, in the first instance, at the general term, and that judgment in the meantime be suspended; to which the plaintiff excepted.

John Slosson, for the defendants. I. This is an attempt to recover upon an alleged parol agreement made cotemporaneously with, or just anterior to, a written contract between the parties, covering the whole subject. Such an action cannot be sustained. The whole evidence relating to the parol understanding was inadmissible, and was objected to by the defendants, and received under their exceptions.

II. That a bill of lading, in everything but the receipt, constitutes a contract, to be considered, like all other written contracts, according to the legal import of its terms, and cannot be varied or supplemented, or added to by parol evidence, is a proposition so old, so long established

and supported, without contradiction, by such a series of authorities in England and this country, that it may be assumed without the citation of a single authority. Had even the alleged prior agreement to send the cotton by "all rail" been in writing, it would have been superseded by the bill of lading. (*Renard* v. *Sampson*, 2 *Kern.* 561. *S. C.*, 2 *Duer*, 285. *White* v. *Van Kirk*, 25 *Barb.* 16. *Creery* v. *Holly*, 14 *Wend.* 26.)

III. The only instance in which a prior parol agreement is not merged in the subsequent written contract, is when the parol agreement constitutes the principal contract, and the written one is merely incidental and subordinate, as where a power of attorney is delivered in part performance of a prior oral agreement, of which it is a mere incident. (*Hutchins* v. *Hebbard*, 34 *N. Y. Rep.* 24.)

IV. The bill of lading in the present case being entirely silent as to the mode in which the goods were to be forwarded to New York, whether "all rail" or "rail and water," the plaintiff cannot show that he understood in conversation with the agent, or that it was agreed between them, that the goods should be sent "all rail." Such evidence is wholly inadmissible, and ought not to have been received in this case. The case of *White* v. *Van Kirk* (25 *Barb.* 16) is on all fours with the present case, and has never been reversed.

V. As the defendants are expressly exempted by the bill of lading from liability for this loss, the plaintiff was properly nonsuited.

VI. There is no sufficient proof of the agency of Cooke.

VII. None of the plaintiff's exceptions are well taken. 1st. The first exception is at folio 23. The plaintiff was endeavoring to show that the defendants had separated these sixteen bales from the others, and were negligent in delaying them, and that if they had not been thus negligent the loss would not have occurred. The court itself interfered, and said that such evidence had too remote a

bearing on the contract. There was but one question at issue on the pleadings, and that was, what had the defendants contracted to do? There was no question of negligence in the case. 2d. The second exception is at folio 46. The plaintiff had offered to show that John King, Jr., auditor and general freight agent of the defendants, said to the plaintiff that if he would procure an affidavit of one of the officers of the insurance company that this property was insured all rail, he would settle this claim. In connection with the offer, he proved that he procured such an affidavit, and presented it to Mr. King, and he refused to pay the claim. The plaintiff also proved that it was customary for King to settle these various losses occurring over the road, and that he had been acting in that capacity. (*a.*) This evidence could only be material as an admission by the defendants that they were legally liable to pay. Such an admission, if made, is never binding. (4 *Wend.* 292.) Admissions are binding only as to facts. A party cannot admit away his legal rights; certainly not in any case not amounting to an estoppel. Mr. King could not (even if he had a general authority to make admissions) create a liability, by the mere admission that one existed. (*b.*) No authority is shown on the part of King to make such admissions. (*c.*) If his agency had been sufficiently proved to have made his admissions binding on his principal, this would not be an admission of that sort; it forms no part of the *res gestæ* of the transaction to which the admission relates; it was made after the transaction; was wholly gratuitous, and can in no sense operate to estop the defendants from claiming their legal rights under the contract. (*Trustees Baptist Church* v. *Brooklyn Fire Ins. Co.*, 28 *N. Y. Rep.* 153. *Schrœppell* v. *Oswego and Syracuse Plank Road Co.*, 7 *How.* 94. *Budlong* v. *Van Nostrand*, 24 *Barb.* 25. *Isles* v. *Tucker*, 5 *Duer*, 393.) 3d. The last exception was to the refusal of the judge to submit the case to the jury. There was nothing to sub-

mit. The bill of lading spoke for itself. The plaintiff himself had proved the custom of the defendants as to forwarding goods from Baltimore. The plaintiff could only recover on the contract, and that gave him no right to recover for this loss.

D. M. Porter, for the plaintiff. I. The contract for transporting the cotton was made by parol, for all rail to New York. An all rail rate was agreed to be paid at New York, for the entire distance. The cotton was all shipped together. No receipt or other writing was made, nor was there any for two or three days after the cotton had been delivered and shipped, (forwarded,) when the defendants' agent sent down a receipt, (improperly called a bill of lading,) which the plaintiff never read. We therefore say that the contract was a parol contract to carry all rail to New York, and that the written receipt, called a bill of lading, never took effect. 1. But even if it did, it expressed on its face that an all rail rate was to be paid, to wit, $1.60 per hundred, and that being written on it, and it containing no other direction how the cotton was to be carried, it amounted to a contract to carry all rail. The plaintiff on the face of the paper could not be forced to pay a higher rate for all rail than he would by water, to avoid the risks of navigation, and then be forced to take the risks of navigation, the rate for which was less than by all rail, which (all rail rate) is what he contracted to pay, and actually did pay for. If the alleged writing had been for transportation by water, the rate expressed would have been $1.50 instead of $1.60; consequently it bears upon its face an all rail agreement. 2. Again, if this construction is not put upon the contract, it must be construed by all of the surrounding facts; that is, what was said and done. (*Bancroft* v. *Winspear*, 44 *Barb.* 209. *Le Sage* v. *Great Western Railway Co.*; 1 *Daly*, 306.) "Viewed and construed by the facts to throw light upon it, it makes it

an unqualified all rail contract." (*Le Sage* v. *Great Western Railway Co.*, *supra.*) It should be read in the light of all the surrounding circumstances. (*French* v. *Carhart*, 1 *Comst.* 102. *Hutchins* v. *Hebbard*, 34 *N. Y. Rep.* 24. *Agawam Bank* v. *Strever*, 18 *N. Y. Rep.* 509.) 3. If the figures 1.60, being the all rail rate, did not make a contract, there is none expressed on the face of the writing, and "it is competent to prove an antecedent parol agreement of a different character, and imposing very different, but not inconsistent obligation," and "by calling in the aid of all the circumstances, a fair explanation of the contract is that it was to be forwarded by all rail to New York." By so doing, it does not disprove a written agreement, but shows an independent agreement. (*Blossom* v. *Griffin*, 3 *Kern.* 569, 574. *Le Sage* v. *Great Western Railway Co.*, *supra.*) Absence of technical promissory words is of no moment. (*Bank of Michigan* v. *Ely*, 17 *Wend.* 508, 512. *Ulster County Bank* v. *McFarlan*, 5 *Hill*, 432.) Being an all rail contract, the defendants are liable. (*Wilcox* v. *Parmelee*, 3 *Sandf.* 610.) 4. But there was no written agreement that the cotton might be carried by water. In order to make an agreement, at least two minds must come together, as to its terms. The plaintiff never read the writing sent to him. Again, the paper is identical in legal effect with the one stated in the case of *Belger* v. *Dinsmore*, (34 *How.* 421; *De Barre* v. *Livingston*, (48 *Barb.* 511.) The bill of lading, if given at the time, would have only amounted to a mere notice, (see same case,) when in fact it was not "sent down" for some days after. If a contract had been made for rail and water, the plaintiff would not have insured the cotton all rail. There can be no pretense that he ever read the paper. 5. Unless the writing (if of any force) be an all rail contract, it is ambiguous and may be explained by parol proof. (*Fish* v. *Hubbard's Adm'rs*, 21 *Wend.* 657. *Smith* v. *N. Y. Cent. Railroad*, 43 *Barb.* 225. *Bradley* v. *Washington &c.*, 13 *Peters*,

89. *Spencer* v. *Babcock*, 22 *Barb.* 326. *Scovill* v. *Griffith*, 2 *Kern.* 509.) For, the figures 160 being the all rail rate, are written, and would control any printed matter. (*Dana* v. *Fiedler*, 2 *Kern.* 40. *Pollen* v. *Leroy*, 30 *N. Y. Rep.* 549. *Woodruff* v. *Com. Ins. Co.*, 2 *Hilt.* 122. *Coope* v. *Smith*, 1 *Smith's Leading Cases*, 305.)

II. If there is nothing on the face of the writing (if it be of any force) specifying how the cotton shall be transported, the plaintiff could have given notice to the carriers (which he did do) to carry all rail, and the defendants would have been obliged to carry out such instructions, or they would have made themselves liable for disobeying the instructions, (*Johnson* v. *The N. Y. Cent. Railroad*, 33 *N. Y. Rep.* 610;) in which case there was a bill of lading and parol notice, and the carrier was held liable on a state of facts nearly identical with the facts of the case now under consideration. (*Miller* v. *Steam N. Co.*, 6 *Seld.* 431. *Le Sage* v. *Great Western Railway Co.*, *supra*. *Goold* v. *Chapin et al.*, 20 *N. Y. Rep.* 259.) The carriers cannot contract for their own negligence; neither can they fail in the performance of their contract, and compel the plaintiff to bear the loss arising therefrom.

III. That Cooke was agent, appears from the receipt or writing, where the defendants' name appears as a party to the bill of lading; by his representations; by the defendants' receipt of the goods under that writing; by the defendants' collection of the freight for the entire distance, and recognizing the contract; also, by carrying the goods under the writing. (*Schroeder* v. *Hudson River Railroad*, 5 *Duer*, 55. *Hart* v. *Rensselaer Railroad*, 4 *Selden*, 37. *Quimby* v. *Vanderbilt*, 17 *N. Y. Rep.* 306.)

IV. But a full and complete right of action exists in the plaintiff against the defendants, even if the contract was agreed to by both parties that the cotton might be shipped by both rail and water; or to put it stronger, if it had been stipulated it should be carried by water and in no

other manner. 1. Because the defendants made themselves liable by their negligence in separating the cotton. 2. Because they delayed the transportation of the cotton nearly one month, when it ought to have reached New York within a week. If these sixteen bales had been delivered in New York at the time the other thirty-five bales were actually delivered, which was on the twelfth day after the shipment, no loss would have occurred. This case is one of a company by its neglect in transportation causing a loss, collecting the freight for what is not delivered, and refusing repayment, and then trying to evade responsibility for such negligence. 3. By not performing their agreement to carry all rail, it being insisted upon that such was the contract as originally agreed upon, and that it could not be changed without the knowledge and concurrence of the plaintiff, which was never given, the contract was made, and sending a notice to the plaintiff, which he never saw, could not change it. 4. In any event, the cotton having been delayed by the negligence of the defendants, they are liable, whatever the contract may have been, as "when goods are delivered to a connecting road, to be transported, it becomes its duty to send them off at once." (*Michaels* v. *N. Y. Cent. Railroad Co.*, 30 *N. Y. Rep.* 564, *identical with our case. Read* v. *Spaulding, Id.* 630.) A carrier is responsible for loss of goods, even by act of God, if he by unreasonable delay in their transportation exposed them to loss. (*Read* v. *Spaulding*, 5 *Bosw.* 395.) He must proceed with reasonable diligence. (*McAndrews* v. *Adams*, 1 *Bing. N. C.* 29. *Lawrence & Co.* v. *Prov. and S. Railroad Co., Superior Court, Norwich, Conn., MS.*)

V. The court below erred in holding the writing was a contract and that the burden of proof was upon the plaintiff, when the converse is true. "The carrier must prove the loss was within the limit of his contract, or it will be presumed that it was such as he was liable for." (*Finn* v. *Timpson*, 4 *E. D. Smith*, 276.) Where is there

such proof? "The carrier is bound to provide a ship, staunch, strong and suitable, equipped for the voyage with proper officers and a proper crew." (*Camden and Amboy Railroad Co.* v. *Burke*, 13 *Wend.* 611, 627, 628.) The presumption is against the carrier. (*Angell on Carriers*, § 156.) Where is the proof that the failure to deliver was caused by "perils of the sea?" For aught that appears, the steamer may have been wrecked by other causes, such as neglect, want of a proper ship, want of proper officers or a proper crew, want of proper equipment.

Lastly. The defendants through their agent, "acting as the defendants' agent in settling these various losses over their road," promised to settle the plaintiff's claim on producing an affidavit, which was equivalent to a promise to pay it. (*Pinkerton* v. *Bailey*, 8 *Wend.* 600. *Stilwell* v. *Coope*, 4 *Denio*, 225.) The plaintiff did so, and the defendants are concluded by it. (*Hurd* v. *Pendrigh*, 2 *Hill*, 502.) The defendants had the plaintiff's demand before them when they made the proposition, and they are liable. (*Brooks* v. *Ball*, 18 *John.* 337.) The court therefore erred in overruling the several objections, and in its rulings. The court ought to have reformed the writing and rendered judgment for the plaintiff. (*Meyer* v. *Fiegel*, *Trans. Feb.* 12, '68. *Wright* v. *Hooker*, 9 *N. Y. Rep.* 59.) There being evidence to be passed upon by the jury, the court could not dismiss the complaint. (*Hoagland* v. *Miller*, 16 *Abb.* 103. *Sheldon* v. *Atlantic Ins. Co.*, 26 *N. Y. Rep.* 460, 465.)

By the Court, G. G. BARNARD, J. The plaintiff accepted the bill of lading, and by such acceptance became bound by its terms. All previous parol agreements were merged in it. It is no defense to the plaintiff, against its provisions, that he did not read the contract. The defendants could not know whether he did or did not read it. The defendants' company acted under the bill of lading as delivered to the plaintiff and accepted by him. The loss is

one provided against in this contract. The carriers were not to be liable "for dangers of navigation while on seas." The loss is admitted to have occurred on steamer "which was wrecked on the way from Baltimore to New York."

The pleadings present no question of negligence. The allegation is that the defendants agreed to transport the cotton entirely by railroad. This is denied, and the bill of lading is conclusive evidence as to the contract which the defendants made, and under it the defendants were not bound to carry entirely by railroad.

There is no proof of the authority of the auditor of the defendants to promise to pay a disputed claim against the defendants and finally bind the defendants by his promise. The evidence offered was properly rejected.

The judgment should be affirmed, with costs.

[New York General Term, June 7, 1869. *Clerke*, *Geo. G. Barnard* and *Cardozo*, Justices.]

The Amoskeag Manufacturing Company *vs.* Garner and Johnson.

The fact that a manufacturing company, not engaged in making *prints* or *calicoes*, and having no trade-mark for them, has placed the name of the place where its mills are located, as a trade-mark, upon *cotton cloths* manufactured by it, does not prevent others from making use of the same local name to designate *printed goods*, or *calicoes* manufactured by them.

The doctrine of trade-marks is not capable of indefinite expansion; it should not be extended beyond its just limits.

Those who have made a name and reputation in trade or manufacture, by calling a given article by a particular name, should be protected, for to that extent it is their property; but if there is an article in the trade, or in the range of manufactures, to which it has not been applied, as to that article any one has a right to give it any name he may select; and if he selects a name which has been applied to some other article or thing, the owner of that article or thing has no right to complain.

The plaintiff, deriving its name from the "Amoskeag Falls," where its mills were located, was engaged in manufacturing cotton cloths, and it had been

its invariable custom, for many years, to stamp or print its name upon goods of its manufacture, sometimes in full, as "Amoskeag Manufacturing Company," at others, "Amoskeag M. Co.," or "A. M. C.;" upon others, "Amoskeag," or "Amoskeag Cotton," or "Amoskeag Duck." The defendants used the word "Amoskeag" upon *printed goods*, or *calicoes*, manufactured by them. It appearing to the court, upon a motion to dissolve an injunction, that the plaintiff did not manufacture or sell print cloths, or calicoes, prior to the introduction of the labels by the defendants, and had no trade-mark or property in the word "Amoskeag," as applied to print cloths, or calicoes; that the defendants first applied that word to their prints and calicoes, and in so doing did not invade the plaintiff's right to use it, as to the goods it did make; that the defendants, in so applying the word to their prints, &c., did not intend to represent them as being of the plaintiff's manufacture, or to injure the plaintiffs or deceive the public; and that in fact the plaintiff had not been injured, nor the public misled or deceived; *Held* that the plaintiff was not entitled to an injunction to restrain the use of the word "Amoskeag" upon the prints and calicoes manufactured by the defendants.

Held, also, that the plaintiff could not be protected in the use of the word "Amoskeag," upon the ground that it was its name; but that it was entitled to protection in its use so far as it had applied the same to goods manufactured by it, and no farther.

That when it should appear that the plaintiff had applied the word, as its trade-mark, to *prints* and *calicoes*, before it was thus applied by the defendants, the defendants could be enjoined from using it; but that until that did appear, the use of the word by the defendants was lawful, and not an invasion of the plaintiff's rights of property.

A delay of nine years, in applying for an injunction to restrain the infringement of a trade-mark, is good cause for refusing it, or dissolving it if granted.

MOTION to dissolve an injunction restraining the use of a trade-mark.

The plaintiff, a New Hampshire corporation, alleged in its complaint, that it had been for thirty-seven years a large manufacturer of cotton cloths, and owned the Amoskeag Falls, where its mills were located; "that the word 'Amoskeag' is an Indian proper name given to the falls before mentioned by the aboriginies; that the plaintiff has always been known by that name; that *no other manufacturing establishment in the world* is known by that name; that the word 'Amoskeag' has not now, and never had, any general use or signification, except as applied to the

falls, and to the plaintiff's business." It also alleged that it had been "its invariable custom to stamp or print its name upon goods of its manufacture, sometimes in full, as 'Amoskeag Manufacturing Company;' at others, 'Amoskeag M. Co.' or 'A. M. C.;' upon others, 'Amoskeag,' followed by the name of the particular article intended to be designated, as 'Amoskeag cotton;' or 'Amoskeag Duck.'" It claimed that the distinctive word of its name is "Amoskeag;" and that it always appeared in full, or that it was indicated by its initial letter. The plaintiff alleged that the defendants used this mark or label upon *printed goods* or *calicoes* manufactured by the defendants. An injunction to restrain such use by them, having been granted by a judge of this court, the defendants now moved to dissolve it.

L. R. Marsh, *Wm. K. Thorn*, and *J. L. Ward*, for the motion.

Evarts, Southmayd & Choate, opposed.

Geo. G. Barnard, J. (After stating and reviewing the facts.) Notwithstanding the mass of facts grouped together in the foregoing statement of the contents of the papers, it seems to me that none of the material questions of fact are much, if at all, in doubt.

The conviction is forced upon my mind, from the papers and the failure of the plaintiff to show specifically (for it must have it in its power so to do,) *when* it commenced manufacturing *print cloths*, that it in fact commenced their manufacture after the introduction by the defendants of the "Amoskeag prints" in the market. The defendants set forth clearly and with emphasis in their moving papers that they introduced this *print* at least nine years ago; indeed, Mr. Pinkham's affidavit shows that nine years ago they were openly and prominently introduced in Boston,

and that the plaintiff must have known of this; and numerous brokers, who have excellent opportunities for knowing, say that they never knew, nor heard of the plaintiff manufacturing print cloths; that they never bought or sold any; they express the belief that the plaintiff never manufactured any print cloths. The plaintiff answers this by the affidavit of Sterett, of this city, a member of the firm of Gardner, Brewer & Co., doing business here as agents of the plaintiff, that for *many years* last past the plaintiff manufactured print cloths, and he refers, as confirmatory of this statement, to a correspondence with a Philadelphia house in 1865. This is not satisfactory. The plaintiff *knows* when it commenced the manufacture of print cloths; it had an opportunity to state it, and, failing to do so, when the fact is of great importance to it, the *presumption* is that it was after the introduction of the defendants' prints into the market that it commenced manufacturing *print cloths.*

Again, it is clear from the papers before me, that the plaintiff is not a *printer;* that, if it is conceded that it manufactures the fabric, it is indisputable that it does not *stamp* the devices, designs, figures and colors upon the cloth. It is equally clear that these labels do not represent the defendants as manufacturers of the fabric, but as printers; they represent that the defendants invent, contrive, and with their skill make and stamp upon standard fabrics the designs, figures and colors, which are upon the prints; that the process of making print cloths is one thing; that the defendants' process is radically and essentially a different thing; that the first process requires, as its foundation, raw cotton, machinery and labor of one kind and of a certain character; that the defendants' process takes any other manufacturer's standard goods, when finished by him as print cloths, and with *coloring material, chemicals, different machinery and different workmen, stamp and imprint* upon the standard fabric, colored figures,

devices and characters; that the two processes are never carried on in the same factory, or by the same manufacturer as one branch of manufacture; that the manufacturers of print cloths, and of prints, throughout the country so understand it; that the trade so understand it; that the dealers in *prints* and *calicoes* never inquire as to the manufacturer of the fabric, but that they inquire simply as to the reputation, character and skill of the printer in producing fixed and fast colors—colors which will wear well, endure exposure to the air and sun, and stand washing; and that it would not make the slightest difference in the world to learn that the print or calico is the plaintiff's or any other manufacturer's make.

These conclusions are founded upon the statements of dealers in the trade throughout the country, by the most extensive manufacturers of fabrics, and by experienced printers, by brokers familiar with the manufacture of print cloths, and of prints and calicoes, and the plaintiff has wholly failed to answer them. It is no answer to these prominent, undisguised and unmistakable facts, to say that one man in Boston supposed he purchased the plaintiff's goods when he purchased "Amoskeag prints;" nor for one man in New York to say that it was believed and understood that the defendants intended to represent their goods as of the plaintiff's manufacture; nor for seven others to say that the labels are calculated to produce the impression that the prints or calicoes are manufactured by the plaintiff. These are not facts to be regarded as outweighing those presented by the defendants.

The plaintiff's counsel, in his third point, says: "But the plaintiff had never printed any of its cloths, and therefore had never used its name on any prints." This statement is in consonance with all the facts of the case; but, nevertheless, the plaintiff's counsel insists that, inasmuch as "the fabric and substance of the article is the same, the difference being in the coloring only," the de-

fendants have invaded the plaintiff's trade-mark. The plaintiff concedes that it has never manufactured *prints;* that it has never had a trade-mark for *prints;* that it has never placed its distinctive name of "Amoskeag" on *prints;* but because it has placed it on everything else in the shape of cotton goods except *prints*, it insists that it, only, has the right to put it there, and that if any one else, however honestly it may be done, places it there, he invades its trade-mark and must be enjoined. To this doctrine I cannot yield assent. I cannot subscribe to it; and, in my judgment, it is an unsound doctrine, and one which has not yet obtained, and never will obtain, a foothold in this or any other country where the principles of equity are intelligently applied and fairly administered. The plaintiff has the right to use this word as it used it prior to the use of the words employed by the defendants as their trade-mark, and any one who appropriates it to his use without the plaintiff's consent, invades its rights, must respond in damages, and will be enjoined. The plaintiff applied it to the great variety of goods manufactured by it, most clearly, except print cloths; and for the purposes of this case, I think it makes no difference whether it applied it to print cloths or not. When the defendants, manufacturing as they do print cloths, apply to them the word "Amoskeag," or call them "Amoskeag print cloths," it will be time enough to determine whether it is an invasion of the plaintiff's rights. It may be conceded that, to the goods of the plaintiff to which it applied this word, it became a trade-mark; that it was the sign, the ear-mark, by which the goods so labeled were known in the community; it was its advertisement, giving character and reputation to the articles upon which it was thus stamped, and if the defendants have placed it upon goods such as the plaintiff has been in the habit of stamping it upon, it may be granted they have done the plaintiff an injury; that they have deceived and are de-

ceiving the community who are acquainted with the plaintiff's trade-mark. If the plaintiff placed this word upon *prints* or *calicoes* of its manufacture, as it has upon its ginghams, the defendants, by placing it upon their prints and calicoes, would invade its trade-mark, and should be enjoined. But they have done no such thing; and right here is the difficulty in the plaintiff's case, and which, in the end, must defeat this action. It never manufactured *prints* or *calicoes;* it never had a trade-mark for *prints* or *calicoes*, and consequently the defendants have not invaded any right of the plaintiff. I deny emphatically that the doctrine of trade-marks is capable of indefinite expansion; that when a word of meaning, a geographical word, is used as a trade-mark and first applied to one branch of manufacturing cotton goods, when there are subsequently invented several distinct branches to it, like Aaron's rod it swallows up all the subsequent branches. The doctrine of trade-marks must not be extended beyond its just limits; or, in a country like ours, filled as it is with enterprise, capital, skill, inventive genius, and with men possessed of progressive ideas, it will in the end be productive of greater injury than good. Protect those who have made a name and reputation in trade or manufacture, by calling a given article a given name, for to that extent it is their property; but if there is an article in the trade, or in the range of manufactures, to which it has not been applied, as to *that* article, any one has the right to give it any name he may select; and if he selects a name which has been applied to some other article or thing, the owner of that article or thing has no right to complain. It follows from these views that, as to prints, the plaintiff never had a trade-mark; that as to *prints* and *calicoes*, the defendants had the right to apply any word of significance, any word having a geographical meaning, not previously applied to those articles; and when they selected a word applied by the plaintiff to goods other than prints,

no rights of the plaintiff were invaded, although the word forms a part of the plaintiff's corporate name; any other rule would be impracticable.

The plaintiff, for over thirty-seven years, has manufactured almost every conceivable cotton fabric; to these it has applied this word in a variety of ways, but it never manufactured *prints;* it never applied it to *prints;* it could have done so if it had desired to, but it did not, and does not; it says it will not do it itself, nor will it permit others to do it. This is a sort of dog-in-the-manger policy, which courts of equity will not enforce. Corporations and vast monopolies must be protected in their legal and well ascertained rights, but it is not incumbent upon courts of equity to prevent others from doing what corporations and monopolies have failed to do, and do not do, simply because they prefer not to do it.

I have examined the cases cited by the plaintiff's counsel, and many others, and no case—no principle established by any reported case which has fallen under my observation—sustains the plaintiff's views.

The counsel for the plaintiff says the distinction between the print cloths and prints, as applied to the entire class of cotton goods, is a distinction without a difference. In this proposition I think the plaintiff's radical error exists. As I have before remarked, with the light thrown upon the distinction by the testimony of manufacturers of print cloths and of prints, by the testimony of cloth brokers, traders and merchants, the difference is as wide as that between day and night. The distinction is as great as that which exists between the *raw cotton* and *print cloths;* for print cloths, after all, are cotton: the distinction is as great as that between the rough, unhewn marble, and the same marble after passing through the hands of skill and art, for sculptured art is marble still; it is as great as the distinction between the canvas

before and after genius and skill have placed upon it their creations; it is as great as the difference between crude brass before and after it has passed through the hands of the "cunning workman;" indeed, these examples might be multiplied without number. A certain kind of skill produces the raw cotton, a higher degree of skill produces the *print cloth;* a still higher, and indeed the highest degree of skill, produces the print—the calico; each is a distinct process, each requires a peculiar process, not applicable to the other. The raw cotton manufacturer may have his trade-mark, and undoubtedly in many instances has it. The print cloth manufacturer may have his, and so may the print manufacturer. Suppose the print manufacturer adopts the raw cotton trade-mark word, or *vice versa*, or that the print cloth manufacturer adopts the raw cotton trade-mark, would an injunction be issued for the invasion of a trade-mark in either case?

The argument of the plaintiff is, that the distinction between print cloths and prints is for manufacturers and experts; that they neither know or care for the difference in the mode of coloring them; good cotton stuff of good color is the thing needed.

Certainly this argument shows that the trade cannot be misled, and it is difficult to see how the masses who use *calicoes* can be. They never use *print cloth*, as I understand it, until after it has been printed; and thus it will be impossible for the masses who use prints or calicoes to know anything of *print cloths*. This is the first inference from the papers before me; but I think the intelligence of those who use prints, calicoes and ginghams, &c., is underrated. I have exhibited the specimens of prints and ginghams submitted, to the humblest servant women, and they at once declare their preference for the print, and show a perfect familiarity both with the print and gingham. It is clear that the trade is not deceived, and I think it is equally clear that the masses are

not; that the consumers and small dealers are not. When the pertinent fact is borne in mind, that the plaintiff has never manufactured or sold *calicoes*, it will be impossible to come to the conclusion that those who have never used them or seen them, or ever heard of them as of the plaintiff's manufacture, can be induced to purchase the defendants' calicoes because the word "Amoskeag" is upon them. The plaintiff never had any name or reputation, good or bad, for producing *calicoes;* it has a good name as a manufacturer of other goods, and when the defendants shall use the word "Amoskeag" upon goods manufactured and sold by the plaintiff, they will do it an injury, may deceive the public, and will be enjoined. But as it is, the plaintiff is not injured; its sales of prints cannot be lessened or injured, for it never sold or manufactured any; its sale or manufacture of goods other than prints cannot be injured by the defendants' conduct, because, as to such goods, the defendants do not apply the word "Amoskeag." These views, if sound, are also fatal to the plaintiff's case, because all the authorities agree that the plaintiff must be injured by the invasion of its trade-mark, and that the public must be deceived or imposed upon. Besides, this court will not aid a party when, by so doing, it works wrong and oppression.

In this case it is apparent that the defendants' labels have been well known in the markets of the country, from Boston to St. Louis, for years; in the former market, near the plaintiff's place of manufacture, for at least nine years. I am well satisfied that the plaintiff was aware of these labels long ago; indeed it nowhere says to the contrary; it must therefore be regarded as having winked at—connived at—the use of this word; it may have supposed it could not in the end injure it; that it could, when it saw fit, enjoin the defendants, and thus prevent the continuance of the use of it *by them;* the defendants have gone on for years, confessedly their right to do so

unquestioned, notwithstanding one of the plaintiff's affidavits says it was understood and believed in New York that the label was employed to produce the *impression that the prints were manufactured by the plaintiff*, and that was nine years ago; they have built up by degrees, and by their skill, enterprise and capital, a good name and reputation for these prints; their sales are large; their damage, by reason of this injunction, being $3000 a day; the plaintiff, after thus lying by, suddenly, when the leading member of the defendants' firm is compelled to pay a sum of money larger than the plaintiff's capital of three million dollars, discovers that its trade-mark has been invaded, its good name for manufacturing everything besides *prints* has been invaded, and it and the public injured by the defendants manufacturing and selling what the plaintiff never manufactured or sold—prints, calicoes. If the plaintiff's views can be sustained, a great injury and wrong certainly will be done in the name of law and equity; the defendants will be enjoined, and their trade-mark and valuable trade secured by their invention, as represented by these labels, will be destroyed. It will be blotted out. Or shall the plaintiff succeed to it? Shall it secure it? The strong arm of equity is never stretched forth and employed, not only to work wrong and oppression, but to enable a party to obtain a dishonest, unconscientious advantage, by appropriating to himself the fruits of another's industry, skill and capital. The plaintiff does not manufacture prints; if the injunction stands, the defendants cannot manufacture or sell prints with these labels upon them; to fill the void thus created, the plaintiff claims it may, for the first time, manufacture the prints or calicoes, imprint upon them "Amoskeag Prints," take them into the markets of the country, and sell them upon the strength and reputation which the defendants' prints have acquired. And the plaintiff claims that this

it shall be enabled to do through the intervention of a court of equity. When such results can be produced in a civil tribunal, organized by the laws, and in conformity to the constitution, it deserves to be called by some other name than a court of law or a court of equity.

Frankness constrains me to say I am unfavorably impressed by the plaintiff's course in selecting the time it did for obtaining and serving its injunction. The defendant Garner states facts and circumstances, and charges an intent on the part of the plaintiff, calling upon it to deny that it designed by these proceedings to embarrass them, financially, by arresting their business immediately after being compelled to pay out a sum of money larger than the plaintiff's capital of three millions; and how does it deny it? By producing the affidavit of a mere agent of the plaintiff, Sterett. It would have been much more satisfactory to have had an affidavit, at least from the treasurer, verifying the complaint.

If it is necessary, to maintain an injunction, for the plaintiff to establish an intent on the part of the defendants to defraud the plaintiff, or to deceive the public, (and I do not mean to express an opinion upon this subject, although many authorities seem to hold that it is,) I think that it has entirely failed to do so. The defendants, when they introduced these prints, in the light of the evidence before me, knew that the plaintiff did not manufacture print cloth; they knew that the plaintiff had never manufactured prints or calicoes; consequently, they knew that the plaintiff had no reputation, good or bad, as to prints or calicoes; they knew that the trader or the consumer never, in purchasing calicoes, inquired after the manufacturer of the fabric, any more than they inquired after the raw cotton out of which the print cloth was made; they knew that standard print cloths were all that were necessary to make desirable prints; that the character of the print depended, with the trade and with the

consumer, upon the skill and reputation of the printer for producing superior devices, designs, figures and *fast colors;* they well knew that their prints must stand or fall, as they produced, or failed to produce, *fast colors:* knowing these things, they undertook the enterprise of adding another name to the already long list of names upon their labels; they had already some names other than Indian names; they had already several Indian names; they added "Amoskeag Prints" to the list to designate another grade of prints; the fabric of these prints contained sixty threads by sixty-four threads to an inch; after a while they concluded to improve the fabric by substituting "standard," containing sixty-four threads by sixty-four threads to an inch; they also improved the colors, and when thus really improved in *fabric* and *coloring*, they *truthfully* called it "Amoskeag Improved;" they introduced it to the trade as their production; the trade so understood it, almost universally, except a single Boston merchant. They selected this word, as the defendant Garner says, for the simple purpose of designating this class of prints from some thirty other varieties, as he selected the other Indian names; that the word has a proper significance as applied to manufacturers, and that it is a fair sounding name. The conclusion is irresistible, it seems to me, that the defendants acted in the best of faith in selecting this word; that they could not, and did not, and do not injure the plaintiff, or deceive the public; that the trade well understood, (as well as the public generally, so far as they have knowledge upon these subjects,) that the prints and calicoes were of Garner & Co.'s production; indeed, I am satisfied, from the whole case, that the plaintiff so understood it, at all events until very recently; otherwise, it is impossible to account for its long silence, and for its toleration of what it now claims to be an invasion, a piracy of its trade-mark, to its great damage.

My conclusions are:

1. That the plaintiff did not manufacture print cloths prior to the introduction of the labels by the defendants.

2. That it never manufactured or sold prints or calicoes.

3. That it had no trade-mark or property in the word "Amoskeag," as applied to *prints* or *calicoes*.

4. That the arts of manufacturing print cloths, and prints and calicoes, are essentially distinct and different as to *material*, machinery, factory, neatness or the *reverse*, *skill* and *workmanship*.

5. That the trade generally, and the consumer, in purchasing *prints* or *calicoes*, never take into account, in the slighest degree, the manufacturer or the place of manufacturing the fabric or print cloth.

6. That the sole inquiry made by the trade, generally, and by the consumer, in purchasing prints or calicoes, is as to the character and reputation of the printer's skill in producing *desirable* and *fast colors*.

7. That the trade generally, as well as consumers, well know and understand the difference between *prints* or *calicoes*, and *ginghams*, &c.

8. That the defendants first applied the word "Amoskeag" to their prints and calicoes, and that in so doing they did not invade the plaintiff's right to use it as to its goods, as it always had used it.

9. That the defendants, in so applying that word to their prints, did not intend to represent their calicoes as of the plaintiff's manufacture.

10. That in so applying it they did not *intend* to injure the plaintiff, nor to deceive the public, and that, in fact, the plaintiff *has not been injured*, nor has the *public* been *misled* or *deceived*.

11. That the sole and only object and design of the defendants in using the word and devices upon their labels

was, and is, to distingush *these calicoes* from other grades and varieties manufactured and sold by them.

12. That the trade so understood it; that the consumers so regarded it, as well as the plaintiff.

13. That these prints were introduced into the markets of the country, and particularly into the Boston market, more than nine years ago, to all the trade, as Garner & Co.'s productions; that the trade throughout the country so understood it, as well as consumers; and the conclusion that the plaintiff so understood it is irresistible from the indisputable facts before me.

14. That these prints have acquired, through the skill, industry and capital of the defendants, a high reputation in the markets of the country; that the plaintiff, well knowing these facts, never questioned, in any way or manner, the right of the defendants to use the word "Amoskeag," and by its silence consented to, if it did not encourage, the defendants in the use of this word upon their labels introducing these prints to the trade generally throughout the country.

15. That, under these circumstances, to deprive the defendants of the use of these labels will work to them great and irreparable injury, wrong and hardship, and at the same time give to the plaintiff a dishonest and unconscientious advantage as the fruits of the plaintiff's own wrong and negligence. The rule is, that the plaintiff must not be guilty of any improper delay in applying for relief. (*Hilliard on Inj.* 34, § 43. *Gray* v. *Ohio, &c.*, 1 *Grant*, 412. *Wood* v. *Sutcliffe*, 2 *Sim.* [*N. S.*] 168.) If a party will lie by and be guilty of laches in the enforcement of his rights, he thereby in many cases forfeits his rights to the relief by injunction. (*Tash* v. *Adams*, 10 *Cush.* 253. *Binney's case*, 2 *Bland*, 90. *Sheldon* v. *Rockwell*, 9 *Wis. Rep.* 166.) In *Lewis* v. *Chapman* (3 *Beav.* 133) a delay of six years and a half was the only ground assigned for refusing an injunction to restrain the piracy of a publica-

tion, when the plaintiff's rights were admitted but for the delay. (*And see Saunders* v. *Smith*, 3 *Myl. & K.* 711; *Smith* v. *Adams*, 6 *Paige*, 443; *Cooters* v. *Hunter*, 4 *Rand.* 58.)

16. That the design and object of the plaintiff in enjoining the defendants, at this particular time, from using these labels, was, and is, to produce financial embarrassment to them, by destroying their profitable trade, immediately after the payment by the leading member of the defendants' firm, in pursuance of the terms of his father's will, of the sum of $3,225,000.

17. That to uphold the injunction upon the papers before me, would be grossly inequitable and unjust to the defendants, would enable the plaintiff to profit largely by its own wrong and negligence, and will thus turn this court into an engine to oppress and destroy, when its true office is to relieve a party from hardship and oppression, and to protect him in the enjoyment of his rights, when they are illegally and wrongfully invaded or threatened with injury.

18. That as to these *prints* or *calicoes*, the labels are the defendants' *trade-mark* and *property*, and whoever invades them does an injury to the defendants' rights of property; they are the defendants' property and trade-marks as to these *prints*, to the same extent that the word "Amoskeag" is the plaintiff's trade-mark and property when applied to goods of the plaintiff's manufacture.

19. That the plaintiff cannot be protected in the use of the word "Amoskeag" upon the ground that it is its name, or part of its name, but it can and must be protected in its use so far as it has applied it to goods manufactured by it, and no farther; and when it shall appear that it has applied it as its trade-mark to *prints* and *calicoes*, before it was thus applied by the defendants, the defendants can be, and must be, enjoined from using it; but until this does appear, the use of the word by the defendants is lawful; it is not an invasion of the plaintiff's rights of property,

and they cannot be enjoined. The following cases and authorities sustain these views: *Fetridge* v. *Wells*, (13 *How. Pr.* 385;) *Howe* v. *Searing*, (19 *id.* 14;) *McCardel* v. *Peck*, 28 *id.* 123;) *Edelsten* v. *Edelsten*, (1 *De Gex, J. & S.*, 185;) *Hall* v. *Burrows*, (10 *Jur. N. S.* 55 *Ch.; S. C.*, 9 *Jur.* 483;) *Amoskeag Manufg. Co.* v. *Spear*, (2 *Sandf.* 599, 607;) *Brooklyn White Lead Co.* v. *Masury*, (25 *Barb.* 416;) *Blofield* v. *Payne*, (4 *Barn. & Adol.* 410;) *Crawshay* v. *Thompson*, (4 *Mann. & Gr.* 357;) *Croft* v. *Day*, (7 *Beav.* 84;) *Millington* v. *Fox*, (3 *Myl. & C.* 338;) *Corwin* v. *Daly*, (7 *Bosw.* 222;) *Bininger* v. *Wattels*, (28 *How. Pr.* 206;) *Burnett* v. *Phalon*, (9 *Bosw.* 192.) These are cases upon the subject of trade-mark, and sustain my views as expressed above.

20. That it will be inequitable and unjust to continue the injunction, and the plaintiff has been guilty of laches. (*See* 2 *Story's Eq. Jur.* § 959, *a; Hilliard on Inj.* §§ 17–43; *Lewis* v. *Chapman*, 3 *Beav.* 133; *Gray* v. *Ohio*, 1 *Grant*, 412.) The injunction was, undoubtedly, properly granted by CARDOZO, J., upon the complaint and affidavits presented to him. Indeed, it was his imperative duty, upon those papers, to grant it, as it is mine, from the whole case, as it now appears, to dissolve it.

Injunction dissolved, with costs.

[NEW YORK SPECIAL TERM, May 3, 1869. *Geo. G. Barnard*, Justice.]

THE PEOPLE, *ex rel.* The Metropolitan Board of Health, *vs.* THADDEUS H. LANE.

A justice of a district court of the city of New York has no power to impannel a jury of twelve to try an action pending therein.

Those courts are statutory courts, having all their powers and jurisdiction conferred upon them, and regulated and limited by a statute, which provides for trials in certain cases, by a jury of six, but makes no provision for a trial in any case, or under any circumstances, by a jury of twelve, or of any number other than six.

It was not the purpose of the constitutional provision declaring that "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate," to enlarge the practice or use of trials by a jury of twelve men.

The legislature could, without violence to that provision of the constitution, give courts of justices of the peace jurisdiction of actions in which the amount claimed did not exceed $100, other than such as those courts had jurisdiction of when the constitution of 1846 was being framed, or when it was adopted, and provide for a compulsory trial, at the option of either party, by a jury of six, of such additional actions committed to the jurisdiction of courts of justices of the peace.

And the legislature could extend the jurisdiction of the assistant justices' courts in the city of New York, by the name of justices' courts in that city, as it seems to have done, in 1849, by amending the Code so as to give such courts jurisdiction of actions similar to those of which courts of justices of the peace had jurisdiction, when the amount claimed did not exceed $100, and provide for a compulsory trial by a jury of six at the option of either party. So, too, the legislature could and did, constitutionally, in the act of 1857, relating to the district courts of the city of New York, provide for compulsory trials by a jury of six, at the option of either party, as to actions within the jurisdiction of such courts in which the penalty or penalties, debt, damages or amount claimed, did not exceed $100.

A statute authorizing a trial by a jury of six in a district court, in the city of New York, does not violate the constitutional right of a party to a trial of the issues by a common law jury of twelve men, where it also provides that the defendant may, at any time after issue joined and before the trial, remove the action to another court, where he can have a trial by a jury of twelve men.

APPLICATIONS for writs of mandamus. The relators brought two actions in the district court for the sixth district of the city of New York, whereof the defendant is the justice. One of the actions was against James W. Ranney, a physician, to recover a penalty of $250, or

several penalties in the aggregate amounting to $250, for alleged violations of certain provisions of the act constituting the board of health, in relation to returns of deaths, &c. The other action was against Thomas P. Kerr, to recover a penalty of $100, or several penalties in the aggregate amounting to $100, for alleged violations of a certain order or ordinance of the board of health relating to tenement houses.

In the action against Ranney, he appeared on the return day named in the summons, and putting in an answer to the complaint which joined an issue of fact, demanded in the usual form a trial by jury, and paid the fees therefor. The trial was thereupon adjourned, and was from time to time thereafter adjourned until December 4, 1868, on which day the action was called for trial, before the said justice, the parties appearing by counsel. The justice thereupon proceeded to impannel a jury of six men. The defendant, by his counsel, demanded a jury of twelve men, and insisted that he could not be compelled to go to trial with a jury of six men. The relators agreed by their counsel, and were willing, to proceed to trial either with a jury of six or twelve, but the justice, holding that the defendant was entitled to a common law jury of twelve, and that he had no power to impannel other than a jury of six, refused to proceed further with the action, and the same remained pending before the said justice, undisposed of.

In the action against Kerr, the defendant, *at the time of joining issue*, insisted that he was entitled to a common law jury of twelve, and the justice decided that he was entitled to a jury of twelve. The trial was then adjourned from time to time until February 9, 1869, when the defendant appeared and declared his readiness to proceed with the trial, but the justice held that a common law jury of twelve having been demanded, he had no power to proceed with the trial, and the action remained pending before the justice, undisposed of.

The relators moved for two several writs of mandamus; one commanding the justice to try and dispose of the action against Ranney with six jurors, and the other commanding the justice to try and dispose of the action against Kerr with six jurors.

John L. Cadwallader, for the relators.

Thaddeus H. Lane and *John M. Scribner, Jr.*, for the defendant.

SUTHERLAND, J. By subdivision 2 of section 3 of the act of April 13, 1857, relating to the district courts in this clty (as amended, *Laws of* 1858, *p.* 569,) these courts have jurisdiction "in an action upon the charter, ordinances or by-laws of the corporation of the city of New York, or a statute of this State, where the penalty shall not exceed two hundred and fifty dollars."

By section 34 of the act of 1857, a trial by jury must be demanded at the time of joining an issue of fact, but when demanded the case may be adjourned until a time fixed for the return of the jury. And this section expressly provides that the issue of fact shall be tried by a jury of six persons to be drawn out of a list or panel of twelve to be summoned.

It is very clear that the justice was right in holding that he had no power to impannel a jury of twelve to try the actions. These district courts are statutory courts, having all their powers and jurisdiction conferred upon them, and regulated and limited, by statutes. The act of 1857 provides for trials, in certain cases, by a jury of six. It makes no provision for a trial in any case, or under any circumstances, by a jury of twelve, or of any number other than six.

The constitution of 1846 (the present State constitution) has this provision: "The trial by jury *in all cases in which*

it has been heretofore used, shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

No question is made here, and no question appears to have been made before the justice, that the causes of action, and the amounts claimed in the actions against Ranney and Kerr severally, were not within the jurisdiction conferred on the district court by section 3 of the act of 1857, as amended in 1858; but as section 34 of the act of 1857 applies to all cases in which an issue of fact is joined, and a trial by jury claimed, the justice, in holding that the defendants Ranney and Kerr were severally entitled to a common law jury of twelve, which he had no power to impannel or use in his court, substantially held said section 34 to be unconstitutional and void as to the actions against Ranney and Kerr, and as to the defendants in said actions.

No doubt a common law jury consisted of twelve men. It has been substantially said in several cases in the Court of Appeals and the Supreme Court, that the purpose of the constitutional provision which has been quoted, was to secure the continuance of the right of trial by a common law jury of twelve men in cases where, or in which, a trial by a jury of twelve was used when the constitution was adopted. (*Cruger* v. *Hudson River Railroad Co.*, 12 *N. Y. Rep.* 190, 198. *Wynehamer* v. *People*, 13 *id.* 427, 458. *Greason* v. *Keteltas*, 17 *id.* 498. *People* v. *Kennedy*, 2 *Park. Cr. Rep.* 317, 321. *People* v. *Carroll*, 3 *id.* 22. *Warren* v. *People*, *Id.* 544. *Duffy* v. *People*, 6 *Hill*, 77, 78, *&c.* *People* v. *Goodwin*, 5 *Wend.* 253. *People* v. *Murphy*, 2 *Cowen*, 815.) It was not the purpose of the constitutional provision to enlarge the practice or use of trials by a jury of twelve men. (*Cases before cited, and Lee* v. *Tillotson*, 24 *Wend.* 337. *Rathbun* v. *Rathbun*, 3 *How. Pr.* 139. *Sands* v. *Kimbark*, 27 *N. Y. Rep.* 147. *Matter of Empire City Bank*, 18 *id.* 199.)

But what has been said, if conceded, does not relieve the decision of the constitutional questions presented by the action and decision of the justice in the actions against Ranney and Kerr from difficulties. To go no farther back, the act of April 5, 1813, gave justices of the peace cognizance of certain actions in which the debt, damages, amount or penalty demanded did not exceed $25, and provided for the trial of issues, at the option of either of the parties, by a jury of six, to be drawn from a panel of twelve. (1 *R. L. of* 1813, *pp.* 387, 391, §§ 1, 9.) The act of April 13, 1824, extended the jurisdiction of the justices of the peace, so as to give them jurisdiction, when the balance due, or the damages or thing demanded did not exceed $50, and this act also provided for the trial of issues by a jury of six to be drawn from a panel of twelve. (*Laws of* 1824, *pp.* 279, 283.) By the Revised Statutes, justices' courts had jurisdiction in certain specified actions, where the debt or balance due, or damages claimed, did not exceed $50; and in actions for a penalty not exceeding $50, given by any statute of this State; and contained substantially the provisions of the acts of 1813, and 1824, as to trials of issues by a jury of six. By the act of May 14, 1840, (*Laws of* 1840, *p.* 265, *&c.*) amending the Revised Statutes, the jurisdiction of justices of the peace, in the actions named in the Revised Statutes, was extended so as to give them jurisdiction of such actions, when the debt or balance due, or the damages claimed, did not exceed $100, and of all actions for a penalty not exceeding $100 given by any statute. The jurisdiction and proceedings of courts of justices of the peace, as prescribed by the Revised Statutes as amended by the act of 1840, continued in force, so far as I am informed, until the Code of 1848. Neither the provisions of the Revised Statutes nor either of the acts which have been referred to, applied to the city and county of New York, or to the courts of inferior civil jurisdiction in that city and county; but from

them it must be presumed that when the constitution of 1846 was being framed, and when it was adopted, trials by a jury of six, or otherwise than a common law jury of twelve, were in use in justices' courts other than in the city and county of New York, as undertaken to be authorized by the legislation referred to, and had been in use in such courts since 1813; and, since 1840, had been in use in such courts in actions for a penalty not exceeding $100, given by any statute, and in certain other actions, when the debt or balance due, or the damages claimed, did not exceed $100.

I think the reported cases which have been referred to, show that an insertion in the constitution of 1846, of the provision which has been quoted, and its adoption, should be viewed as recognizing and sanctioning this usage, and as affirming the constitutionality under the constitution of 1822, (which contained a provision in the same words as the one quoted from the constitution of 1846,) of the provisions of the Revised Statutes, and acts referred to, which undertook to authorize the usage.

What had been the legislation, and what must be presumed to have been the usage as to trials by a jury of six, or otherwise than by a common law jury of twelve, in the inferior courts of the city of New York, of civil jurisdiction, prior to the constitution of 1846, and what must be presumed to have been such usage in such courts when the constitution was being framed, and when it was adopted? To go no farther back, the act of April 19, 1813, (2 *Rev. Laws of* 1813, *p.* 370, § 85,) provided for the appointment of one assistant justice for each of the wards of the city, except the ninth, and for two assistant justices for the ninth, and gave such assistant justices power to hold courts for the trial of certain specified actions, when the sum or balance due, or damages or thing demanded, did not exceed $25, and for all sums of money not exceeding $25, recoverable by suit in any court of record, by

any statute of this State, and generally for the trial of all such actions as were triable before justices of the peace in the respective counties of the State. Section 95 of the act (page 374) provided for the trial of issues in such courts, at the option of either of the parties, by a jury of six, to be drawn from a panel of twelve. By the act of January 4, 1820, the act of 1813 was amended, so that the assistant justices' courts of the city of New York, in all actions of which they had jurisdiction by the act of 1813, had jurisdiction to the amount of $50, and under. This act left the provisions in the act of 1813, as to the trial of issues, in force. The assistant justices' courts of the city of New York were recognized and continued, with their powers and jurisdictions, by the Revised Statutes, (2 *R. S.* 224,) and, so far as I am informed, existed with such powers and jurisdictions when the constitution of 1846 took effect.

From the legislation relating to these assistant justices' courts, which has been referred to, it is to be presumed that when the constitution of 1846 was being framed, and when it was adopted, trials by a jury of six, or otherwise than by a jury of twelve, had been used in them since 1813, and that since 1820 such trials had been used in them, in actions for penalties, and other actions of which they had jurisdiction, when the penalty or debt, or damages claimed, did not exceed $50; but it must be conceded that, prior to the constitution of 1846, the legislature had not undertaken to give these courts jurisdiction in the actions of which they had jurisdiction, to an amount beyond $50; and it is to be presumed that trials by a jury of six, or otherwise than by a jury of twelve, prior to the constitution of 1846, had not been used in such courts in actions for the recovery of a penalty, debt, or damages, exceeding $50, for it is to be presumed that such actions had not been brought in such courts.

By the act of March 30, 1848, the city of New York was

divided into six judicial districts, and a court established in each district, to be called the "justices' courts of the city of New York." The act provided for the election of justices for such courts, and gave to the justices to be elected all the powers and jurisdiction of the assistant justices, and abolished the assistant justices' courts. By the act of April 12, 1848, the name or designation of "justices' courts of the city of New York" was changed back to that of "assistant justices' courts of the city of New York." The Code of 1848 (which took effect July 1, 1848) recognized and continued substantially the jurisdiction of these courts by the name of "assistant justices' courts." By the Code, as amended in 1849, the style of these courts was again changed to "justices' courts of the city of New York," and their jurisdiction, as to the sum or amount recoverable, extended, as I understand it, to $100. By the act of April 16, 1852, the style of these courts was changed to that of "district courts in the city of New York." The act of April 15, 1857, which has been referred to, which extended (as amended in 1858) the jurisdiction of these "district courts," as to the penalty, sum or amount recoverable in them to $250, may be regarded as reorganizing these "district courts," and as thus amended, in deciding these motions, may be regarded as prescribing their powers, jurisdiction and proceedings, when the actions against Ranney and Kerr were brought.

Now, as to the question of constitutional right raised by the proceedings in the action against Kerr, which action is for a penalty of $100, or several penalties in the aggregate amounting to $100, and in which Kerr claimed he had a right to a common law jury of twelve, *at the time issue was joined*, in view of all that has been said, and of the cases and legislation which have been referred to, I think the modifying words, "in all cases in which it has been heretofore used," in the provision which has been quoted from the constitution of 1846, should be regarded

as recognizing and sanctioning, not merely the usage as to trials otherwise than by a jury of twelve, as it then existed, and had been authorized by legislation in courts of justices of the peace, the assistant justices' courts, and other inferior courts of local jurisdiction, but should be regarded as also recognizing the general principle that the legislature might provide for the trial of actions otherwise than by a common law jury of twelve in inferior courts of local civil jurisdiction, in which the penalty, debt, damages, balance due or amount claimed did not exceed $100, the amount to which courts of justices of the peace had jurisdiction by the Revised Statutes, as amended by the act of May 14, 1840, before referred to.

The constitutional provision should be viewed as recognizing and protecting the right to a trial by a common law jury of twelve in cases in courts of record, in which it had been theretofore used; but the qualifying words which have been quoted imply that there were and had been trials otherwise than by a common law jury, and the framers of the constitution must be presumed to have had knowledge of previous legislation and usage as to trials otherwise than by a jury of twelve in inferior courts of local jurisdiction, and must be presumed to have recognized and adopted the principle which had dictated the legislation, and which originated and undertook to authorize the usage.

I think the legislature could, without violence to the constitutional provision, give courts of justices of the peace jurisdiction of actions in which the amount claimed did not exceed $100, other than such as these courts had jurisdiction of when the constitution of 1846 was being framed, or when it was adopted, and provide for a compulsory trial at the option of either party, by a jury of six, of such additional actions committed to the jurisdiction of courts of justices of the peace; and I think the legislature could extend the jurisdiction of the assistant justices' courts in

the city of New York, by the name of justices' courts in the city of New York, as it seems it did in 1849, by amending the Code so as to give such courts jurisdiction of actions similar to those of which courts of justices of the peace had jurisdiction, when the amount claimed did not exceed $100, and provide for a compulsory trial by a jury of six, at the option of either party; and I think the legislature could and did, constitutionally, in the act of 1857, relating to the district courts of this city, provide for compulsory trials by a jury of six, at the option of either party, as to actions within the jurisdiction of such courts, *in which penalty or penalties, debt, damages or amount claimed, did not exceed* $100; and irrespective of the question whether these district courts should be regarded as new inferior courts of local civil jurisdiction established under the constitution of 1846, or as substantially the same courts as the former assistant justices' courts.

The constitution of 1822 contained, in immediate connection with the provision as to trials by jury, this provision: "And no new court shall be instituted but such as shall proceed according to the course of the common law, except such courts of equity," &c. This provision was left out of the constitution of 1846, but *it* contains the following provision: "Inferior local courts of civil and criminal jurisdiction may be established by the legislature in cities, and such courts, except for the cities of New York and Buffalo, shall have an uniform organization and jurisdiction in such cities."

These views, if correct, are decisive of the case of Kerr; as it follows from them that Justice Lane, under the act of 1857, had and has power to impannel a jury of six to try the issues in the action against Kerr, and to try the issues with such jury, and that Kerr could not rightfully claim the protection of the constitutional provision as to trials by jury.

As to the constitutional question raised by the proceed-

ings in the action against Ranney for a penalty of $250, or several penalties, in the aggregate amounting to $250, I do not think it can be said that the act of 1857 violates his constitutional right to a trial of the issues by a common law jury of twelve men, for by subdivision 3 of section 3 of the act, he had and has the right, at any time after issue joined, and before the trial, to remove the action to the court of common pleas, where he can have a trial by a jury of twelve men, upon executing an undertaking to the plaintiff with one or more sureties to be approved by the justice, to pay any judgment which may be recovered against him in the court of common pleas. I do not think that these terms, upon which he can have a jury of twelve, should be regarded as such a clog upon his constitutional right to a trial by a jury of twelve as to be a violation of it.

Moreover, Ranney did not claim a right to a jury of twelve at the time issue was joined, nor until after several adjournments; but at the time issue was joined, he did demand a trial by jury, which meant such a jury trial as he could have in that court. Now I am not sure that it cannot be said that Ranney waived any right to a jury of twelve, otherwise than by complying with the terms mentioned in section 3 of the act of 1857.

Upon the whole, I think both motions should be granted without costs; but the mandamus in the case of Ranney must be, that Justice Lane try and dispose of the action with a jury of six, unless Ranney removes the action to the court of common pleas, under section 3 of the act of 1857, before the commencement of the trial in the district court.

[New York Special Term, at Chambers, May 8, 1869. *Sutherland*, Justice.]

GEORGE N. MILLS *vs.* DIANA C. LEWIS.

It is well settled that the mistake of one of the parties to a contract is not enough to authorize the court to reform it. There must be a *mutual* mistake—a mistake of both parties.

The agent of the plaintiff negotiated with the defendant for the sale of a horse by the plaintiff to the defendant, in exchange for a mortgage held by the latter, under instructions not to make the exchange unless the defendant would guaranty the *payment* of the mortgage. This the defendant refused to do, but agreed to make the exchange and guaranty the *collection* of the mortgage. The scrivener employed to draw the assignment of the mortgage, and guaranty, by mistake drew a guaranty of *payment*, instead of a guaranty of *collection* of the mortgage, and the defendant supposing the assignment to contain a guaranty of collection merely, executed the same, and delivered it, with the mortgage. The plaintiff received the mortgage and assignment without any knowledge of the mistake, and thereupon delivered the horse to the defendant. In an action by the plaintiff upon the guaranty:

Held, 1. That it was not a case of mutual mistake, the plaintiff getting only what he required to be given; and that although the defendant had executed an obligation that she did not intend to execute, yet it was through the mistake of her agent, the scrivener, that the wrong was done, the plaintiff being free from any imputation of fraud.

2. That the result was that there never was a meeting of the minds of the parties, as to the sale, and it was competent for the defendant to return the horse and rescind the contract; and this was the only relief to which she was entitled.

3. That there being no ground laid by the proofs for *reforming* the instrument, and the defendant not having done that which alone could entitle her to rescind the contract, the plaintiff was entitled to judgment for the amount remaining due upon the mortgage, and interest.

ASEL SPICER and wife executed and delivered a mortgage to the defendant, to secure the payment of a portion of the purchase money of certain premises. A bond, executed by Spicer alone, accompanied the mortgage. One Baldwin, the agent of the plaintiff, negotiated the sale of a horse to the defendant, in exchange for the mortgage, under instructions from the plaintiff not to make the exchange unless the defendant would guaranty the *payment* of the mortgage. The defendant refused to do this, but finally agreed to make the exchange and guaranty

the *collection* of the mortgage. One Rundell was thereupon employed to draw the assignment and guaranty of *collection*, but by mistake he drew the following instrument, being a guaranty of payment, instead of a guaranty of collection, and the defendant executed the same and delivered it, with the mortgage, to Baldwin:

"For and in consideration of the sum of sixty dollars to me in hand paid, I hereby sell and transfer the within mortgage to George N. Mills, of Hounsfield, and guaranty the payment of the same, with interest."

The mistake was known to Baldwin, at the time of the delivery of the assignment and mortgage, but the defendant never knew of the error until after the mortgage had become due, and this suit had been commenced. She supposed the guaranty to be one of *collection*, instead of *payment*, as was her agreement with Baldwin.

This action was brought upon the guaranty contained in the assignment. The defendant, in her answer, alleged the mistake, and prayed for the reformation of the guaranty.

There was no assignment or delivery to the plaintiff of the bond accompanying the mortgage, nor proof given, on the trial, of its loss.

L. J. Dorwin, for the plaintiff.

Anson B. Moore and *John C. McCartin*, for the defendant.

MULLIN, J. The objection by the defendant's counsel, that as the bond to which the mortgage was collateral was not assigned, the mortgage is of no validity, and the defendant cannot be made liable on a guaranty thereof, was not taken on the trial, and cannot be insisted on now. The plaintiff might, perhaps, have shown that the bond had been assigned, or there never in fact was one executed. It is enough to know that he has had no opportunity to be heard, and the objection must be disregarded.

There being no fraud on the part of the plaintiff, or of Baldwin, and there being no motive which could induce the scrivener who drew the assignment and guaranty to practise a fraud on the defendant, I think the only ground for relief, if there is any, is on the ground of mistake, inadvertence or surprise. I think, upon the proofs before me, it is satisfactorily established that the defendant did not intend to execute a guaranty of payment; nor did she know, at the time she executed the paper drawn by Mr. Rundell, that it was not a guaranty of collection. So far as the defendant is concerned, therefore, a clear case of mistake is made out.

But it is well settled that the mistake of one of the parties to a contract is not enough to authorize the court to reform it; it must be the mutual mistake of both parties. (*Nevius* v. *Dunlap*, 33 *N. Y. Rep.* 676. *Botsford* v. *McLean*, 42 *Barb.* 455.) A new trial was granted by the special term, in the case last cited, and on the second trial it was proved that the defendants perpetrated a gross fraud on the plaintiff, in reference to the notes sought to be reformed, and the notes were decreed to be reformed according to the prayer of the complaint. (*Botsford* v. *McLean*, 45 *Barb.* 478. *See Kent* v. *Manchester*, 29 *id.* 595; *Story's Eq.* §§ 155, 160.) The important question in this case then is, was there a mistake on the part of the plaintiff, in reference to the kind of guaranty which the defendant was to give? Or did he know, when he received the assignment and guaranty, that it was not the instrument that the defendant had agreed and intended to give?

Personally, the plaintiff had no negotiation with the defendant concerning the trade. He had authorized his agent to exchange the colt for the mortgage, with the defendant's guaranty of payment. It does not appear that Baldwin ever communicated to him the refusal of the defendant to give the guaranty required, or the offer to give a guaranty of collection only. When the guaranty of

payment was handed him, by Baldwin, he did not know of any intention on the part of the defendant to give a guaranty of collection. There was therefore no knowledge on the part of the plaintiff, of any mistake; on the other hand, the defendant had sent to him the guaranty he required, and it was in conformity with the bargain as he understood it to be, and intended it should be made. Unless, therefore, the knowledge of Baldwin, that the defendant did not mean to give a guaranty of payment, binds the plaintiff, there was no such mistake as entitles the defendant to relief.

It is necessary, in order to determine this question, to ascertain precisely the relation which Baldwin occupied to the parties, in effecting the trade. The plaintiff and Baldwin are the only persons who speak as to the interview between them when the plaintiff informed Baldwin of the terms upon which he would sell the colt. We must look to their evidence for the powers, if any, given to Baldwin to act for the plaintiff. The plaintiff says: "I told Baldwin I would trade the horse for $75, and I would take the mortgage, if he would make it $75, and Mrs. Lewis should guaranty payment instead of collection; that I would take it on no other condition; I would not be bothered collecting it; when it came due I would call on her. He (Bradley) said he thought he could make the trade." On cross-examination he says: "I told Bradley how I would trade; I did not direct him to carry the proposition to any one. He said he thought he could make the trade." Baldwin testifies: "I was acting for both parties, in making the trade. I made a trade for the mortgage. I bought the mortgage for Mills. Had a talk with the plaintiff before going to see the defendant about this trade; the plaintiff first suggested the trade to me; his proposition was for me to sell the colt to them, (meaning the defendant's family;) as they had no horse, and he would take the mortgage if they would guaranty it. I told him I did not

think the mortgage good for anything. He said he did not care; he would take it if she would guaranty it and pay the difference. I told him I would see her, and I did. Think the plaintiff talked of guaranty of payment or collection, but cannot tell which he said. Talked generally about guarantying. The plaintiff talked of guarantying the mortgage, sometimes the payment; sometimes the collection; the plaintiff wanted me to aid him in selling the horse."

Baldwin's recollection as to the kind of guaranty the plaintiff required, is not clear. The plaintiff swears positively, he told Baldwin he must have a guaranty of payment; and if Baldwin's opinion, that the mortgage was good for nothing, was correct, the probability is that the plaintiff required, as he swears he did, a guaranty of payment. It would be difficult to find a reason for his taking such a mortgage with a guaranty of collection. For these reasons I have found, as matter of fact, that the plaintiff instructed Baldwin that he would not take the mortgage unless payment was guarantied.

What, under these circumstances and upon this evidence, was the power conferred by the plaintiff on Baldwin? The plaintiff had fixed the price of the colt at either $75 or $85; it is not certain which, nor is it material. He had agreed to accept the mortgage, and had designated the guaranty he must have. He made it a condition of the trade, that he should have the use of the horse for a while, after the completion of the trade.

Baldwin, if he is to be treated as the agent of the plaintiff, was acting under special instructions—authorized to complete a sale upon terms specifically defined. All that he had to do was to carry the plaintiff's proposition to the defendant, and if it was accepted, the sale was complete. If not accepted, then the power of Baldwin to sell the horse was terminated. There was no discretion whatever vested in him.

When, therefore, the defendant refused to give the guaranty of payment, the power of the agent terminated. If the defendant proposed new and different terms, it was the duty of the agent to submit these terms to the plaintiff for acceptance or rejection, and until accepted there could be no bargain made that bound the plaintiff. It would seem from the evidence of the witnesses that Baldwin did not inform the defendant that she must give a guaranty of payment, or the plaintiff would not trade. On the contrary, it would seem to have been left discretionary with the defendant to give whichever form of guaranty she should deem proper, and she elected to give one of collection, and so informed the agent. He was present when the instructions were given for drawing the guaranty, and when it was drawn and signed he received it as, and supposed it to be, a guaranty of collection.

Baldwin was a special agent, acting under specific instructions, and it was the duty of the defendant to ascertain the nature and extent of the authority; and she dealt with him, therefore, at the peril of having the agent's contract repudiated if it turned out that he had exceeded his powers. (*Story on Agency*, §§ 126, 127, *and notes. Paley on Agency*, 202, *and notes. Batty* v. *Carswell*, 2 *John.* 48. *Nixon* v. *Palmer*, 4 *Seld.* 398. *Scott* v. *McGrath*, 7 *Barb.* 53.)

I do not think the plaintiff would have been bound by the acceptance by the agent (if Baldwin's can be considered as such) of a guaranty of collection, if one had been given to him; unless the principal had accepted it, when offered to him. The guaranty offered was the one he required; he accepted it without notice of any mistake on the part of the defendant, and there clearly was none on his own part. This not being a case of mutual mistake, and the plaintiff being free from any imputation of fraud, the question is, is the defendant entitled to any relief,

and if any, to what kind and measure of relief is she entitled.

That she has executed an obligation that she did not intend to execute is established. But it was through the mistake of her agent, the scrivener, that the wrong was done her. The plaintiff got only what he required to be given, and Baldwin was not authorized to accept anything else. The result then is, that there never was a meeting of the minds of the parties, as to the sale, and it was competent for the defendant to return the colt and rescind the contract; and this was, I apprehend, the only relief to which she is entitled.

There is no ground laid by the proofs for reforming the instrument, and the defendant has not done that which alone can entitle her to rescind the contract. She cannot retain the horse, and defeat a recovery on the ground of mistake, on an obligation made and delivered by herself in payment for the horse, and which is the identical obligation that the plaintiff required to be delivered to him.

I therefore order judgment for the plaintiff for the amount remaining due on the mortgage, and interest, but not until the guaranty is properly stamped, which the plaintiff is permitted to do.

[JEFFERSON SPECIAL TERM, March 1, 1869. *Mullin*, Justice.]

Matter of Real.

A prisoner, on the trial of an indictment, has a right to insist that the conviction of a witness called in his behalf, of a penitentiary offense, if proved at all, be proved by the record of conviction.

A witness cannot be asked whether he has been convicted and sentenced to the penitentiary, although he does not himself object.

Even on the cross-examination of the witness, his conviction of the crime cannot be proved, by way of impeachment, by his own admission and consent, if the prisoner objects to such proof.

MOTION for a writ of error. The prisoner, John Real, having been indicted for homicide, was found guilty, and now moved for the allowance of a writ of error.

Sutherland, J. The evidence of Henry Real, a witness called and sworn on behalf of the prisoner, was certainly material. On his cross-examination, he was asked, by the district-attorney, this question: "Have you ever been arrested in New York?" His answer was: "I have, sir." He was then asked, "Do you remember what for?" This question was objected to by the counsel for the prisoner, and appears not to have been answered. The district-attorney then asked this question: "Have you ever been in the penitentiary?" This question was objected to by the counsel for the prisoner. The court then told the witness that he need not answer the question, if he did not want to. The witness then answered: "I will tell the truth; I was in the penitentiary." The district-attorney asked: "How long there?" The witness answered: "Four months; innocent of the crime, too."

Asking the witness whether he had been in the penitentiary was substantially, in effect, asking him if he had been convicted of a criminal offense and sentenced to the penitentiary. An answer to the question involved an admission or denial by the witness of such conviction and sentence. *Newcomb* v. *Griswold*, (24 *N. Y. Rep.* 298;) *People* v. *Herrick*, (13 *John.* 82;) *The King* v. *Inhabitants of*

Castell Careinion, (8 *East*, 77,) and other cases which might be referred to, tend to show that the prisoner had a right to insist that the conviction of the witness of the penitentiary offense, if proved at all, be proved by the record of conviction; that the witness could not be asked whether he had been convicted and sentenced to the penitentiary, although he did not object; that even on the cross-examination of the witness the conviction of the witness of the crime could not be proved by way of impeachment, by his own admission and consent, if the prisoner objected to such proof.

I cannot say, therefore, that there are not reasonable grounds for thinking that the court may have erred in permitting, after objection by the prisoner's counsel, the witness to answer the question whether he had been in the penitentiary; although the witness was willing to answer it. I cannot say that this question is so free from doubt that it is not reasonable that the prisoner should have an opportunity of presenting it to the general term, for decision.

Again; considering the evidence of the witness Real, on his direct examination, which tended to show, if credited, that there was a clinch and a struggle between the prisoner and the deceased, before any shot was fired, or any report of a pistol heard, I cannot say that the court was so clearly right in overruling the offer of the prisoner's counsel to show that the deceased had on several occasions, prior to the killing, beaten and bruised the prisoner, to the peril of his life, and had made threats of violence against him, and that those threats had come to the knowledge of the prisoner, that it is unreasonable that the prisoner should have the opportunity of presenting also the question as to the admissibility of this evidence for the decision of the general term.

Without adverting to other points or grounds of error urged by the prisoner's counsel, I think that it is my duty,

under the circumstances, to allow the writ of error, and direct that the same shall operate as a stay of the proceedings until the opinion and judgment of the general term can be had upon the case.

I need not say that I have not come to this conclusion without a most careful examination of the bill of exceptions and of the questions presented by it. But perhaps I should say that this conclusion has not been arrived at without consulting with the learned judges who so kindly sat with me when the application was argued.

Writ allowed.

[New York Special Term, at Chambers, March 1, 1869. *Sutherland*, Justice.]

Peter Coykendall *vs.* Nathan P. Eaton.

55b 188
76 AD 335

The duties owed by an inn-keeper, as such, are due only to his guests. To constitute one a guest, it is not necessary that he be at the inn in person. It is enough that his property be there, in the charge of his wife, or servant, or agent, who is there in his employ, or as a member of his family.

But they must be there in such a way that the law will imply the property, while there, to be in his possession, and not in the possession of the person who is there with it, as his bailee.

Where the owner of property hires it out or lends the use of it to the person who takes it to the inn, in either case the owner can claim only the ordinary rights of owner, as against a subsequent bailee, and not the special rights which belong to a guest; unless such special rights are expressly transferred to him by his bailee.

A bailee for hire, or a gratuitous bailee, who delivers the goods he has as such bailee, to a wrong party, or who, after they are demanded of him, does not in any way account for their loss, is liable to the true owner for their value.

If a bailee is liable for gross negligence as such, the action for not delivering the property on the proper demand being made, can be maintained either by the bailee from whom the defendant received it, or by the real owner.

Where property is delivered to the servant or agent of an inn-keeper, and thus comes to the possession of the latter, and is afterwards delivered by him to

a wrong person, or otherwise lost by his gross negligence, he is liable; whether it be as inn-keeper or not, and whether he is a gratuitous bailee, or a bailee for hire.

It is therefore erroneous, in an action against an inn-keeper as bailee, after evidence has been given, tending to prove that the person in the employ of the defendant, who received the property, for the latter, had authority so to do, to nonsuit the plaintiff, without submitting it to the jury to decide whether the agent had authority to receive the property for the defendant, and whether the latter, or his agent, did not afterwards deliver it to a wrong party.

APPEAL from an order of the county court of Onondaga county, denying a motion for a new trial.

The action was commenced in a justice's court, and a trial was there had, and a judgment rendered in favor of the plaintiff. An appeal was taken, to the county court, and on the trial there, a verdict was rendered for the plaintiff. On appeal to the Supreme Court, a new trial was granted, on the ground that the plaintiff was not entitled to recover, with directions that the costs should abide the event. On the second trial, in the county court, the plaintiff was nonsuited, and a motion for a new trial was denied.

T. K. Fuller, for the appellant.

R. H. Gardner, for the respondent.

By the Court, FOSTER, J. This action was commenced in a justice's court. The plaintiff complained of the defendant "for one wolf robe and cushion, left in the possession and care of the defendant, which he neglects and refuses to deliver, and claims damages in the sum of $40." The answer was a general denial, &c. A trial was had before the justice, who rendered judgment in favor of the plaintiff for $45 damages and costs, and the defendant appealed to the county court, where the cause was tried, and a verdict rendered for the plaintiff; which, upon appeal to this court, was set aside and a new trial ordered.

The cause was again tried, in the county court, and before opening the case to the jury, the plaintiff's counsel moved to amend the complaint by alleging that the defendant was an inn-keeper, and that the plaintiff was his guest, at the time of the loss of the property in question. The motion was denied, except on condition that the plaintiff pay the costs of the previous trial in the county court, and the costs of the appeal to the general term of this court. The plaintiff's counsel declined to amend on the terms imposed by the court, and excepted to the ruling. And it is insisted, now, that the ruling of the court below, in that respect, was erroneous; that such error was material, and calls for a new trial.

It is hardly worth while to discuss the correctness of the decision below, for the plain reason that the amendment applied for could not possibly have benefited the plaintiff.

The undisputed facts show, that Charles Coykendall, who left the robe at the defendant's house, and who was the son of the plaintiff, was twenty-five years of age; that he went to the defendant's house to attend a ball or dance, having a lady in his charge; that he borrowed the property in question of his father; that he went there on his own business; and that in doing so he was in nowise acting as the agent or servant of the plaintiff. And no claim is made that he was a member of the plaintiff's family.

Now the duties of an inn-keeper, as such, are due only to his guests. To constitute one a guest, it is not necessary that he be at the inn in person. It is enough that his property be there, in the charge of his wife, or servant, or agent, who is there in his employment, or as a member of his family. But they must be there in such way that the law implies the property, while there, to be in his possession, and not in the possession of the person who is there with it as his bailee. It will not do to hold that a livery man who lets to another a horse or team, which the hirer takes to an inn, can claim, as between himself and

the inn-keeper, to be a guest, so as to charge him as inn-keeper for the horse or team. It is the bailee of the livery man that is the guest, and to him only is the inn-keeper responsible *as such*. And the rule is the same whether the owner of the property hires it out, or lends the use of it to the person who takes it to the inn. In either case, the owner can claim only the ordinary rights of owner, as against a subsequent bailee, and not the special rights which belong to a guest; unless such special rights are expressly transferred to him by his bailee. And the case also shows that when Charles Coykendall finally left the premises of the defendant, he left the property there to be called for thereafter; so that as to him, also, the relation of inn-keeper and guest, if it had ever existed, was at an end.

The plaintiff, then, if he can maintain this action, must do so upon the principles which govern ordinary transactions of bailment, and without reference to the special obligations imposed upon an inn-keeper.

Soon after arriving at the defendant's house, Charles Coykendall handed his robe to one Case, who had charge of the robe-room, and had his name pinned on to it. He bought his ticket for the ball for his lady and himself, and at about half past two o'clock in the morning left, with his partner, for home, having paid twenty-five cents for keeping the robe, and taking it with him. After leaving the defendant's house, and within a few rods of it, he sheered to the left and drove off the bank. His buggy was tipped over and broken, and his horse escaped from him, with the buggy, except the top part of it, including the robe and cushions. He took the robe, and, with his lady, went back to the house, handed his robe to Case, who said he would pin his name on it again. He then procured a light and went to the place of the accident, found a cushion of the buggy, brought it to the house and delivered it to Case. He staid there, with the lady, about

three hours, having, during that time, a private room, and they left again, paying no bill for the time they were then there. Just before starting, he asked the bar-keeper (not Case) if it would be perfectly safe for him to leave the cushion and robe there, until he could send for them in a day or two; Case, who was at the robe-room, having given him permission to leave them there; and he did leave them, and went home.

The plaintiff's counsel then asked the witness: "What did the bar-keeper answer, when you asked him if the robe and cushion would be safe if left there until you could send for them?" This was objected to, on the ground that "it is not admissible under the pleadings; also that the bar-tender is not proved to be in the employ of the defendant." The objection was sustained by the court, and the plaintiff's counsel excepted. The only evidence then, or at any time, given, in the case, to connect the alleged bar-keeper with the defendant, was the testimony of Charles Coykendall that he "had seen this bar-keeper waiting on people to drinks, that evening." I think the objection to the evidence offered was correct. Enough had not been shown to make the defendant responsible for any undertaking of his, especially one in regard to storage of property, after the relation of inn-keeper and guest, if it existed at all, was ended.

It appeared on the trial that within a day or two thereafter, Charles Coykendall demanded the robe and cushion of the defendant; that the defendant did not deliver them to him, and no account was given, on the trial, as to what became of them. Case was not called by either party, as a witness, and aside from the fact that he had charge of the robe-room that night, his relations to the defendant were not clearly defined, and the testimony of the defendant himself, on that point, was to some extent contradictory of itself. As, for instance, he testified consecutively as follows: "No one else in the house was charged with

taking charge of robes, &c., except Case. Case was instructed not to check anything unless it belonged to the dancing party."

Q. "How was Case to know who belonged to the party?"

A. "I instructed him; no, I did not give Case any special instructions, that evening, on that subject.

And Charles Coykendall testified that on the trial of the cause before the justice, the defendant swore that Case was in his employ that evening, and that the defendant told him, when he demanded the robe, that Case took charge of the robe-room, that evening.

The only question I have, in regard to the case, is, whether the above and the like evidence which was given, should not have been submitted to the jury, according to the request of the plaintiff's counsel, for them to decide whether or not Case had authority to receive the robe and cushion for the defendant, of Charles Coykendall, when he returned with them after the accident; and whether the defendant or his agent did not afterwards deliver them to a wrong party. For if he had authority to receive them, and they in that way came to the possession of the defendant, and were afterwards delivered by him to a wrong person, or otherwise lost by his gross negligence, he is liable, whether as inn-keeper or not, and whether he was a bailee for hire, or gratuitously so.

The rule is that a bailee for hire, or a gratuitous bailee, who delivers the goods he has as such bailee, to a wrong party, or who, after they are demanded of him, does not in any way account for their loss, is liable to the true owner for their value. (*Willard* v. *Bridge*, 4 *Barb.* 361. *Beardslee* v. *Richardson*, 11 *Wend.* 25. 2 *Parsons on Cont. 5th ed.* 96, *note w.* *Esmay* v. *Fanning*, 5 *How.* 228, 232.)

And if the defendant is liable for gross negligence as such bailee, the action for not delivering, on the proper demand being made, can be maintained either by the

bailee from whom the defendant received it, or by the real owner.

The court erred in not submitting the case to the jury, and in nonsuiting the plaintiff.

A new trial should be granted, with costs to abide the event.

[ONONDAGA GENERAL TERM, April 6, 1869. *Bacon, Mullin, Foster* and *Morgan*, Justices.]

AMES *vs.* RATHBUN and STEARNS.

Although no motion for a nonsuit is made upon the trial, and the case is submitted to the jury under a charge to which no exception is taken, the court, upon an appeal from the judgment and from the order denying a new trial, may review the facts as well as the law, and set aside the verdict, in the exercise of the power conferred upon it by sections 329 and 349 of the Code of Procedure.

Advice of counsel, given upon a full and fair statement of the case, and acted upon in good faith, is a good defense to an action for malicious prosecution.

But where the counsel testifies that the statement on which his advice was sought and given, corresponded in all respects with the facts contained in the affidavit on which the plaintiff was arrested; and that affidavit states that the plaintiff *falsely* and *fraudulently* represented that, &c.; if the jury find that there was no probable cause for the accusation of fraud, there is no ground for saying that the statement to counsel was fairly made, or that it was in good faith acted upon.

APPEAL by the defendants from a judgment entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The action was brought to recover damages for a malicious prosecution. The defendants brought an action against the plaintiff in one of the district courts of the city of New York for fraud, in obtaining money by means of false and fraudulent representations. Being arrested, the plaintiff herein gave bail, and on the adjourned day the

parties appeared, and proceeded with the trial. The justice, after hearing the proofs in the case, dismissed the complaint.

This action has been tried three times, and each time a verdict was rendered for the plaintiff, except the first, when the jury did not agree.

Wm. W. Mann, for the appellants.

Oscar Frisbee, for the respondent.

By the Court, GILBERT, J. The only exception taken by the defendants was to the admission of evidence of the dismissal of the complaint in the action in which the plaintiff was arrested. The objection to this evidence was that the complaint contained no averment of the fact sought to be proved. But it was at once obviated by an amendment allowed by the court, to which no exception was taken. The evidence, therefore, was properly received, even if the amendment was improperly allowed. But we are of the opinion that the amendment was properly allowed. The complaint contained all the averments requisite to maintain an action on the case for a malicious prosecution, except the averment that the prosecution was ended. The only effect of the amendment was to supply this omission, and this is clearly within section 173 of the Code.

It has been urged, on this appeal, that the evidence fails to make out a want of probable cause, or malice, and therefore, that the plaintiff should have been nonsuited. Although no motion for a nonsuit was made, and the case was submitted to the jury under a charge to which no exception was taken, we might review the facts as well as the law, and set aside the verdict, in the exercise of the power conferred upon the court by sections 329 and 349 of the Code, because the appeal is both from the judgment

and the order denying a new trial. (*Macy* v. *Wheeler*, 30 *N. Y. Rep.* 235. *Parker* v. *Jarvis*, 34 *How. Pr.* 256. *Keyes* v. *Devlin*, 3 *E. D. Smith*, 523. *Pumpelly* v. *Owego*, 13 *Abb.* 387. *Lane* v. *Bailey*, 1 *Abb. N. S.* 407.)

But upon a review of the case, we are unable to say that the evidence is insufficient to warrant the verdict, or that the jury were misled by any misdirection. The jury must have believed the testimony of the plaintiff. Upon this it can hardly be contended that there was not a want of probable cause for the unqualified statement contained in the affidavit, on which the warrant of arrest was issued. The question of malice was properly submitted to the jury. The remarks of the judge, respecting the effect which ought to be given to the advice of counsel, were accurate, and were quite as favorable to the defendants as the evidence warranted. Advice of counsel, given upon a full and fair statement of the case, and acted upon in good faith, is no doubt a good defense to an action for malicious prosecution. The testimony of Mr. Rathbun, the counsel, was that the statement on which his advice was sought and given corresponded in all respects with the facts contained in the affidavit aforesaid. The affidavit states that the plaintiff *falsely* and *fraudulently* represented to the defendants that, &c. The jury have found that there was no probable cause for the accusation of fraud. There is, therefore, no ground for saying that the statement to counsel was fairly made, or that it was in good faith acted upon.

The judgment, and the order denying the motion for a new trial, must therefore be affirmed, with costs.

[DUTCHESS GENERAL TERM, May 10, 1869. *Lott*, *Gilbert*, *J. F. Barnard* and *Tappen*, Justices.]

In the matter of THE PEOPLE, *ex rel.* James D. McClelland, *vs.* JOSEPH DOWLING and RICHARD KELLY, Justices &c.

A mandamus should not issue for trifling reasons; nor when there is another adequate remedy.

And although a party may be remediless except by that writ, it does not necessarily follow that it should be issued. The application for it rests in the sound discretion of the court, which will grant or refuse it according as the issuing or withholding it will best promote the ends of justice.

Even if it were proper to grant the writ, when an attorney is *debarred* by a subordinate court, without authority, to compel it to permit him to practice in such court, yet a refusal to listen to the relator, in a single case, or a declaration that the justices would not allow him to practice in such court, cannot alone be regarded as debarring him, and therefore will not justify the writ.

In the absence of any record evidence of an order debarring the relator, at least a determined and persistent refusal to hear him, upon proper demand, when business gave him a right to be heard, must be shown before the motion can be successful.

An illegal *debarment* must be shown, either by an order duly made and entered, or by *acts* which practically work debarment.

Where the only act of the court, of which the relator complained, related to a single case, which was ended before a mandamus was applied for; *Held* that his general rights not being affected by the order made in that case, there was nothing pending in which he had any interest that could give him a standing in court to ask for the writ.

The court should hesitate long before attempting to control, by mandamus, the action of magistrates who, even though they have exceeded the strict limits of their authority, were acting for the highest interests of the profession and the public, and deserve the greatest commendation and support. *Per* CARDOZO, J.

THIS was an application for a mandamus to compel the defendants, justices of the court of special sessions in the city of New York, to permit the relator to practice, as an attorney at law, in the courts held by them.

CARDOZO, J. It is very well settled, in this State, that a mandamus will not be issued when there is another adequate remedy, but that the converse of that is not invariably true. Therefore, although, except by that writ, a party may be remediless, that does not necessarily require that the writ should issue; but the application for it rests

in the sound discretion of the court, which will grant or refuse it, according as the issuing or withholding it will best promote the ends of justice. Guided by these simple rules, there can be no difficulty in disposing of this motion. It is plain that a mandamus should not issue.

The case fails to disclose any personal malevolence towards the relator, but very clearly shows that Justice Dowling and his associate, Justice Kelly, have long set themselves against a system which has become so notorious that none of us can shut our eyes to its existence—a system which drives many reputable lawyers from courts which formerly were graced by the learning and character of such men as the Hoffmans, the Grahams, the Bradys, the Blunts, the Sandfords, and the O'Conors of our profession, and which should be honored by their legitimate successors, but who feel that the class against whom the action of the respondents is directed, bring practice in the criminal courts into disrepute. Until this shameless conduct shall cease, and the disreputable practitioners are driven from among us, I see no safety for those of the poorer classes who are charged with crime, before the inferior criminal tribunals; unless, as I trust will be done, the legislature shall interfere, and provide for the employment by the county of some reputable lawyer to protect that unfortunate class of citizens, just as we now protect the rights of the rest of the people of the State, by employing a public prosecutor.

If, in efforts directed against a system, and a class, to guard the practice of the profession against the unworthy, an innocent individual should occasionally suffer temporarily, it is to be deplored, but I should still hesitate very long before attempting to control, by mandamus, the action of magistrates who, even if it be conceded that they have exceeded the strict limits of their authority, are acting for the highest interests of the profession and the public, and deserve the greatest commendation and support. I think

sound judicial discretion demands that, without passing upon the question of power in the court below, I should say that I will not interfere by this extraordinary remedy, believing that it is better for the public that some temporary inconvenience and loss should be borne, even by a perfectly innocent individual, than that purposes so worthy should be at all thwarted by the action of this court; especially when I can say, as I do to this relator, that I have confidence that when, on a proper occasion, his rights are presented to the magistrates, they will be fully respected, without the necessity of any interposition by this court.

That confidence I derive, in this instance, not only from the reputation of the magistrates, but from the spirit pervading the opposition to this motion, which displayed itself, among other things, in the kindly invitation by the respondents' counsel to the relator, throughout the case, to present a further affidavit in respect to the charge against him by the woman Hock. The relator, under that invitation, did, at a late stage of the proceedings, make an affidavit much more explicit than that which he presented to Judge Dowling, and exhibiting the matter in a different light from that in which it first appeared; and I do not doubt that if he had originally respectfully presented that to the magistrate, it would have been regarded as satisfactory.

When I see such a disposition to afford opportunity to the relator to place himself aright, I think I cannot err in saying that he can safely trust the justice of the magistrates, and that to them he should be remitted.

These views would dispose of the present application, and therefore I shall not consider the question of the power claimed to exist in the court below, to suspend a lawyer from practice, temporarily, until the charges against him can be reported to this court for its action. But there are other conclusive reasons why this motion should be denied.

If it be conceded that the writ should go when an attorney is *debarred* by a subordinate court, without authority, which is the most that can be claimed, still this application should not be granted, because a case of debarring is not made out. The most that can be pretended is, that on a single occasion—in Wood's case—the magistrates refused to hear the relator, and that subsequently they stated that they would not allow him to practice in that court. But this does not amount to a debarring of the relator; and since the Wood case, he has had no business in the court, and has made no attempt to appear and practice there.

If it be assumed that the court of special sessions is only a court of record for some purposes, and that all its orders need not be formally entered in the minutes of its proceedings before they are to be considered perfect—as to which it is unnecessary to, and therefore I do not, express any opinion—still, something more than a mere statement by the magistrates, that they would not, in future, permit the relator to practice, made when the latter had no business before the court, demanding that he should be heard, should appear.

This writ should not issue for trifling reasons. A refusal to listen to the relator, in a single case, cannot alone be regarded as debarring him, and therefore would not justify it. It might be a mere ebullition of temper, from which no human being is exempt, engendered, perhaps, by some trifling circumstance or feeling, for which a writ of mandamus would be a very inappropriate remedy.

But the conclusive answer to the application is, that the only act of the magistrates shown, related to but one case, which was ended before this proceeding was initiated, and therefore, his general rights not being affected, there is nothing pending in which the relator has any interest which can give him a standing in court to ask for a mandamus.

In the absence of any record evidence of an order debarring the relator, at least a determined and persistent refusal to hear him, upon proper demand, when business gave him a right to be heard, must be shown, before the motion can be successful. In other words, an illegal *debarment* must be shown, either by an order duly made and entered, or by *acts* (not mere words) which practically work debarment.

Even if the remarks attributed to the justice were made by him, I am not at liberty to say that when the relator duly, on some proper occasion when he has business entitling him to it, asks recognition of his license to practice, it will not be accorded to him.

I have no right to presume that a magistrate will not perform his duty, even though he may have hastily or thoughtlessly expressed himself as to what his course would be, at a time when he was not called upon to act judicially. Until some *act* towards putting into execution the determination which the respondents are alleged to have expressed, to exclude the relator from practice, has been done, I must presume that none such will occur; and if not, a mandamus should not go to oblige them to retract language which they may have uttered.

Until dereliction from duty on the part of a magistrate clearly and positively appears by something more solemn than mere words, which may be spoken to-day and disregarded to-morrow—something more practical than a mere declaration of an intent as to the future, which may be formed now, and changed before the time to put it in execution arrives—something in respect to a subject like the present, at least like, for instance, as I have already said, a determination to exclude the relator from practice, exhibited either by an order duly entered, or by persistent refusals in cases where the relator was retained, and ap-

peared and claimed his rights, or by some *act* of the justice, manifesting such a determination, I think no case for this extraordinary remedy is made.

Motion denied.

[NEW YORK SPECIAL TERM, July 6, 1869. *Cardozo*, Justice.]

55b 202
25ap163

LIBBY *vs.* ROSEKRANS, CHENEY and others.

The law provides but two modes of correcting errors in legal proceedings; one by *motion*, where the error is one of form, arising out of a failure to conform to the settled rules of practice of the court; the other by *appeal*, where the errors consist in the omission of the court itself to properly observe and apply the law affecting the rights involved in controversy, in making its adjudication upon them. *Per* DANIELS, J.

Where, in actions upon contracts for the sale and purchase of land, the judgments ascertained the amounts prospectively to become due to the plaintiffs, respectively, for principal and interest, at the several times when the same were agreed to be paid by the defendants, and then directed that in case the same should, at those periods, remain unpaid, then the plaintiffs should have judgments for their recovery, and executions for their collection; *Held* that there was not only nothing improper in this disposition of the cases, but that on the contrary the correct practice relating to them was pursued.

Held, also, that even if the directions contained in such judgments were unwarranted by the law applicable to such cases, the error could not be corrected by means of an independent action against the plaintiffs in such judgments, brought by a stockholder in the corporation which was the defendant therein.

When a receiver of the property and effects of a corporation is appointed, and qualifies, he becomes, by the express terms of the statute, a trustee not only for the creditor upon whose application he was appointed, but for all the other creditors of the corporation.

And where, upon the application of such receiver, directions are given, by the court, as to the manner of making a sale of the property of the corporation in his hands, such directions cannot be assailed, in a collateral action, on the ground that they were in effect procured by a judgment creditor of the corporation who then was, and still is, a justice of this court.

It does not follow, from that circumstance, that the creditor was not authorized to apply for the order; or that he could not draw the petition on which it was made, and the order itself, either before or after it was directed to be entered.

Being a judgment creditor of the corporation when the receiver was appointed, and the receiver becoming a trustee for all the creditors, such creditor is interested in the subject matter upon which the receiver is to be directed, and on which he is to be required to proceed.

Although, as a general rule, a justice of this court is prohibited from practice in it as an attorney or counselor, yet that prohibition does not extend to, or include, such a proceeding as the above, where a justice is interested in the subject matter of it. In such a case he is, by the express language of the statute, at liberty to act.

It is no ground for setting aside a sale of the property of a corporation, made by a receiver, that the creditor upon whose application the order of sale was obtained, being a justice of this court, was, by means of his official position, able to exercise an improper influence in the proceedings, over the court; where it is not shown that his official position resulted in producing any different order or directions than the settled practice authorized the court to give, or than would have been given where any other person was interested in the proceedings to be taken.

An order, giving directions to the receiver as to the mode of conducting the sale, in such a case, is not objectionable because it allows the sale to be made upon fourteen days' notice posted in two public places and published two weeks in a newspaper printed in the city of New York.

If an order directing the receiver as to the manner in which he shall proceed in giving notice of, and making, the sale, in such a case, is irregular or improvident, its correction should be sought by a motion before the court that made it. An independent action will not lie, for that purpose, even though the plaintiff was not a party to the proceeding in which the order was made. Such an order cannot be questioned in a collateral action brought by a stockholder of the corporation whose property is sold.

There is nothing to prevent such stockholder from applying to the court before which the proceedings were had, by motion, to set them aside, if irregular. He is, by the express terms of the statute, a party to the proceedings, the receiver being a trustee for the stockholders as well as the creditors, and equally bound to guard their interests as he is those of the creditors.

And if the receiver fails in his duty in that respect, or lends himself to the creditors, to the unnecessary prejudice of the stockholders, the court before which the proceedings are taken, upon that being established, would intervene, on his application and set them aside.

The primary object of a sale of the property of a corporation, by a receiver, being to satisfy judgments against it, the judgment creditors are at liberty to bid upon and buy it; and that can be done by all together, or by one, for the benefit of all. Hence, an allegation, in a complaint, that prior to such a sale, two of the defendants who were creditors, entered into some arrangement by which they were to jointly participate in the property which one of them should buy at the sale, falls entirely short of supporting the charge of fraud in the procurement of the order of sale and the order confirming

the receiver's report of sale. And such allegation is not strengthened by the averment that this arrangement was observed by a division of the property between the creditors.

Nor will the charge of fraud be supported by an allegation in the complaint that the defendants, combining together, and for the purpose of securing to themselves the property of the corporation by virtue of their judgments, induced the receiver to apply to the court, by petition, for instructions as to the sale of such property; that the receiver was acting in their interest, and was under their control and direction; and that the petition, and the order made upon it, were prepared by one of the defendants; where there is no averment that they induced the receiver to apply for such directions; or that he did so apply, in order to carry such conspiracy into effect; or that the application or order had anything to do with the execution of such a purpose.

So, as to an allegation that one of the defendants, acting for himself and a co-defendant, entered into a corrupt and collusive agreement with certain persons specified, *claiming* to act as agents, or otherwise, for the corporation, by which such defendant was permitted to obtain the order of the court directing the manner and mode of sale of the property and interests of the corporation; and that by and through the same corrupt and collusive agreement, the sale was managed and conducted by the receiver under the advice and counsel of the defendants; where it is not averred that the persons with whom the collusive and corrupt agreement is alleged to have been made were authorized to act on the part of the corporation, or to compromise it by giving any consent or agreement.

Such an allegation is also defective in not setting forth the substance of the agreement claimed to have been made. Where an agreement is alleged to be collusive, the specific manner in which the fraud was perpetrated, or agreed to be perpetrated, should be set forth.

APPEAL by the plaintiff from an order made at a special term, sustaining demurrers to the complaint, interposed by the defendants E. H. Rosekrans, and John H. White, receiver of the Adirondack Company.

The action was brought by the plaintiff in his own behalf, and in behalf of all others, stockholders or creditors of the defendant, the Adirondack Estate and Railroad Company, who might choose to come into court and contribute to the costs and expenses of this action.

The complaint shows that prior to the year 1860 a corporation was in existence known as the "Lake Ontario and Hudson River Railroad Company." That this com-

pany had acquired the title to five hundred thousand acres of land in northern New York, upon the line of a projected railroad from Saratoga Springs to Sackett's Harbor, and which land had by the action of the legislature of the State of New York been exempted from taxation, and that in acquiring such land, and in constructing a road-bed upon such projected route, such company had expended $2,000,000, or thereabouts. That subsequently another corporate company was organized, known as the "Adirondack Estate and Railroad Company," which succeeded to all of the rights and property of the "Lake Ontario and Hudson River Railroad Company." That on the 8th day of October, 1860, the defendants Albert N. Cheney and Enoch H. Rosekrans made two several contracts with the "Adirondack Estate and Railroad Company," by which the said Cheney agreed to sell to said company fifty-four thousand one hundred and forty-five acres of land, situate in the wilderness of northern New York, at the sum of $162,435. Upon which contract Cheney received, at the date of the execution of the same, the sum of $500. The contract also provided that the company should pay the balance as follows: $1000 January 1, 1861; one quarter of the balance April 1, 1861; another quarter, with interest, January 1, 1862; another quarter payment, with interest, on the 1st day of January, 1863, and the residue January 1, 1864. The agreement further provided that if the company failed to perform its agreement as to payments, then the agreement might be declared void at the election of Cheney, and all prior payments to be forfeited, but if the agreement was performed, said Cheney was to make a conveyance to the company. That Enoch H. Rosekrans made also his agreement of sale as before stated, the substance of which was that he agreed to sell and convey to such company fifty-six thousand acres, or thereabouts, of wild land, supposed to be upon the line of the road-bed and route belonging to the com-

pany, at the aggregate sum of $168,297, upon which the sum of $500 was paid Rosekrans upon the execution of the contract, and as to the balance, that was to be paid in manner and time as fixed by the contract with Cheney. That instead of treating the payments made at the inception of the contracts as a mere forfeiture by the company, Cheney and Rosekrans brought their several actions in this court for a specific performance of the same, and on the 19th day of February, 1862, each of said defendants recovered a judgment against the company, which were entered in the office of the clerk of this court in the county of Warren. That an execution upon the judgment in favor of Cheney was issued and returned *nulla bona*, and N. Edson Sheldon was appointed receiver upon the sequestration of the property of the judgment debtor, by the order of this court made at a special term held at Plattsburgh in the month of June, 1862. That in the month of July, 1862, upon the application of one George W. Chadwick, a judgment creditor, another receiver, Alexander Seward, was appointed by the order of this court, at a special term held in the county of Oneida, but who was subsequently succeeded by the appointment of Andrew Dexter, by the order of the same court, on the 6th day of December of the same year. That by an arrangement between Rosekrans, Cheney and Chadwick, both of said receivers acted in concert in making sale of all of the property of the Adirondack Estate and Railroad Company. And preparatory thereto Rosekrans and Cheney conspired together to secure to themselves the large property of the company, and having the complete control of Sheldon, one of the receivers, who acted throughout in the interest of Rosekrans and Cheney, induced Sheldon to apply to this court in the 4th judicial district for instructions as to the terms and mode of sale of the property of the judgment debtor. Such application, however, was made in the action in which Cheney was the plaintiff, but the petition and order

were prepared and drafted by Rosekrans, who in that regard acted as counsel for Cheney. That order was as follows:

"On reading and filing the petition of N. Edson Sheldon, receiver of the property &c. of the Adirondack Estate and Railroad Company, dated the twenty-second day of November, 1862, and praying the advice, direction and instructions of the court in reference to the matter set forth in the said petition; and after hearing Mr. Brown, of counsel for said petitioner, it is ordered that the said N. Edson Sheldon, receiver, &c., be authorized, directed, advised and instructed, as follows, viz: The said receiver may, in his discretion, advertise for sale at public auction, to the highest bidder, for cash, the real property of which the said company was seized in fee at the time of his appointment, and also its interest in the lands contracted to be sold to said company, by E. H. Rosekrans and A. N. Cheney, respectively, and its other interest in lands, as mentioned in the said petition, by some brief and general description, without distinguishing or describing the lands separately. Said notice shall be given at least fourteen days before the day of sale, by posting the same in at least three public places in the city and county of New York, and by publishing the same at least two weeks in a newspaper printed in said city; and the sale shall take place at the city of New York. Said sale may be adjourned from time to time at the discretion of the said receiver, and if any adjournment shall be made for more than five days, the same notice thereof shall be given as is above required for the notice of the sale, except as to time, which shall be sufficient if the notice is published and posted the day after the adjournment is made.

It is hereby declared that the judgment in favor of Enoch H. Rosekrans and Albert N. Cheney, referred to in the said petition, are the first liens upon the lands so to be sold, and are such liens to the full amount thereof, presently due and hereafter to grow due and payable, to wit,

the sum of three hundred and sixty-eight thousand three hundred and forty-nine dollars and thirty-six cents, on the twenty-second day of November, 1862.

The said receiver is hereby directed, when he shall open the said sale, to ascertain whether in his judgment there are persons present who, in case the property is offered in separate parcels, bid in good faith, and pay in the aggregate for the several parcels, as much as or more than the sum aforesaid amounts to, and in case there are any such persons, then he shall offer the same for sale in parcels in such manner as may produce the highest price. But in case he shall be satisfied that the property will not in the whole fetch as much upon said sale as the amount above stated, and in case the said Cheney shall attend said sale in person, or by agent, and be ready and willing to bid thereat in one bid for the whole property the sum aforesaid, distinguishing for what particular portions of the property specified amounts are offered, with reference to its consisting of real estate or interest in land contracts, or in lands, the said receiver shall offer the said property for sale as an entirety, and shall sell the same as an entirety to the highest bidder, but not for less than the sum aforesaid; and in case such purchaser shall be the said Cheney, then the said receiver shall apply so much of his bid as was for the real estate upon the two judgments hereinbefore referred to, without requiring him actually to pay over the money, provided the proper receipts and satisfaction pieces are given by the said Cheney and Rosekrans, to take effect when the deed is delivered and sale confirmed.

The said receiver may use his own discretion as to joining in the sale with Alexander Seward, also claiming to be receiver &c. of said company; but he is directed to do nothing which he shall be advised, by his counsel, shall in any manner injuriously affect his claim to priority or any of the interests represented by him."

That the receiver, N. Edson Sheldon, in virtue of this order and the directions given him by Rosekrans and Cheney, did on the sixteenth day of December, 1862, sell at public sale, at the Merchants' Exchange sales rooms, No. 111 Broadway, in the city of New York, the vast property of the Adirondack Estate and Railroad Company, the same being struck down to Cheney in the presence of Rosekrans, as follows: The interest of the company in the Cheney and Rosekrans land contracts, for the sum of $100, and the road-bed and all other lands held in fee by the company, for the sum of $370,068.32, which bid was taken by the receiver to apply upon what was then due and to grow due under the judgments in favor of Rosekrans and Cheney respectively.

As matter of fact, the complaint alleges that Rosekrans and Cheney were jointly interested in the bid made by Cheney at such sale, and that upon a previous arrangement it was understood between those parties that the property acquired upon such sale should enure to their joint benefit, which agreement was thereafter carried out between them by conveyance from Cheney to Rosekrans, vesting in him his appropriate share. That after Rosekrans and Cheney had thus obtained the property of the Adirondack Estate and Railroad Company, they sold the same to another company known as the Adirondack Company, the present owner of the property, and in making such sale Rosekrans and Cheney received $400,000 for the lands originally sold by them, and which were bid off at the receiver's sale for the sum of $100, and for which the Adirondack Company paid in cash $100,000, securing the residue by two mortgages covering the same lands; and as to the residue of the property formerly owned by the Adirondack Estate and Railroad Company, Rosekrans and Cheney received of the capital stock of the Adirondack Company $1,000,000, and its bonds in the sum of $400,000.

The complaint further discloses as matter of fact, that at

the time that these transactions occurred, Enoch H. Rosekrans was one of the justices of the Supreme Court, and as such had, and exerted, an undue influence over the court in his district, and also that in his own behalf and as counsel for Cheney he entered into a corrupt and collusive agreement with Hezron A. Johnson and others acting ostensibly in behalf of the Adirondack Estate and Railroad Company, by which Rosekrans and Cheney were enabled to carry out their plans through the forms of law for the acquisition of the large and valuable property of the Adirondack Estate and Railroad Company. That certain actions have been commenced in this court against the said Adirondack Company, in which such proceedings have been had that the defendants John A. Dix and John H. White have been severally appointed receivers of the assets and property of the said Adirondack Company. And that said receivers last named, acting in hostility to each other, are assuming some control and management of said railroad, and the interests, rights and property of said Adirondack Company. And the said plaintiff further alleges, upon information and belief, that the lands so contracted to be sold by the said Rosekrans and Cheney to the Adirondack Estate and Railroad Company, and bid off by said Cheney at the sum of $100, were, in point of fact, worth the sum at which said lands were sold to said company by the contract aforesaid, and for which said Rosekrans and Cheney recovered their judgments respectively, as hereinbefore set forth. And that the other property so sold at such receiver's sale to said Cheney, as hereinbefore stated, being the road-bed, lands and other interests of the Adirondack Estate and Railroad Company, was at the time of such sale, to the knowledge of said Rosekrans and Cheney, and of said receiver, who conducted said sale, worth the sum of $2,000,000, or thereabouts.

And the plaintiff alleges and avers, that the order hereinbefore recited, directing the mode and manner of such

sale, was void, and in violation of the statute in such cases made; and also that such sale, as conducted, was in violation of the rights of said Adirondack Estate and Railroad Company, and the plaintiff, as also of the stockholders of the company lastly above named. That said Rosekrans and Cheney have, by the scheme and collusion before charged, obtained an unfair and unconscionable advantage against said Adirondack Estate and Railroad Company, its stockholders and this plaintiff, and others. That the notice of sale, as published by such receivers under the judgments obtained by said Rosekrans and Cheney, did not contain a full or accurate description of the lands hereinbefore described, by metes and bounds, or otherwise, so as to properly inform the public of such sale. That said Rosekrans and Cheney are now profiting by the undue advantage so gained as aforesaid, and have sought, and are now seeking out of such surreptitious and collusive transactions, to gain a much greater amount of money for their lands than was contemplated, or than they should have, at the expense and detriment of the plaintiff and others, stockholders of the Adirondack Estate and Railroad Company. And the plaintiff further alleges, that he did not know until the month of November, 1866, that such fraud and collusion had been practised as hereinbefore set forth, nor that such sale had been as aforesaid conducted. That to allow such receiver's sale to stand, will work great wrong and injury to the plaintiff and others, the stockholders and others interested, of the Adirondack Estate and Railroad Company. That the said Rosekrans and Cheney are now seeking through the forms of law to sequestrate the property of the Adirondack Company, and to secure the payment of the said sum of $300,000 out of the property and assets of said company, instead of resorting to the foreclosure of the mortgages aforesaid, thus impairing the value of the stock of said company, which stock, but for the action and doings of the said Rosekrans and Cheney

as above stated, would have value in the market as well as for permanent investment. That the most, if not all, of said stock which is set apart as an issue to said Rosekrans and Cheney, is now retained by said Adirondack Company.

The plaintiff demanded judgment, and for relief, as follows:

First. That the sale of the property, road-bed, lands, and interest in the lands of said Adirondack Estate and Railroad Company, made jointly by the receiver, firstly hereinbefore mentioned, to said Cheney, be set aside as having been and being unjust, oppressive, fraudulent and illegal. Or,

Second. That said plaintiff, and others interested with him, who may unite with him in this action, be subrogated to all of the rights, benefits, and pecuniary advantages which the said Rosekrans and Cheney, or either of them, now have, or may have acquired, under and by virtue of the contract and sale of said property hereinbefore set forth, to the Adirondack Company, save and excepting the two mortgages of $150,000 each, to said Rosekrans and Cheney, respectively, and that said Adirondack Company be compelled to cancel such stock, scrip or bonds, standing in the name of said Rosekrans and Cheney upon the books of said company, and to issue a like amount of stock and bonds to such receiver as may be appointed by this court, for the benefit of the parties plaintiff herein concerned. And that said Adirondack Company be restrained, by the order of this court, from issuing any stock or bonds of said company to said Rosekrans and Cheney; and that as to such bonds or stock as may, under such contract and sale, have been issued to said Rosekrans and Cheney, or either of them, and which may have been sold or hypothecated by them, or either of them, said Rosekrans and Cheney account and pay over to such receiver the proceeds of the same; and that as to such stock or

bonds still in their hands and not disposed of, they and each of them be restrained by like order from disposing of the same, and that they be required to transfer the same to said receiver, for the benefit of said plaintiff, and such other persons who may unite with him in this action.

Third. That the said Rosekrans and Cheney be perpetually enjoined from taking any further action, by action at law or otherwise, against said receivers, John H. White and John A. Dix, or against said Adirondack Company, for the collection of the said sum of $300,000, excepting only by the foreclosure of said mortgages upon the lands embraced within the same by description.

Fourth. That said receiver last named be perpetually enjoined from paying to either said Rosekrans or Cheney, their attorneys, heirs or assigns, any portion of the said sum of $300,000 out of any funds, property or assets of said Company, excepting the property and lands embraced in mortgages aforesaid.

Fifth. That a referee be appointed by this court to take proof of the matters of this complaint in equity, under such directions as may seem proper, with the view of adjusting the equities of the various parties concerned prior to a preliminary order for the appointment of a temporary receiver; and that such receiver be also appointed by this court, according to the rules and practice of this court in such cases.

Sixth. That this court grant a temporary injunction order restraining said defendants from doing any of the acts now apprehended hereinbefore set forth, and of the nature and effect hereinbefore prayed for

Seventh. For general relief.

The defendant John H. White, receiver, &c., demurred to the complaint, on the ground that it appears on the face thereof that the complaint does not state facts sufficient to constitute a cause of action.

The defendant Enoch H. Rosekrans demurred to the complaint, on the following grounds:

1st. The court has no jurisdiction of the subject of the action.

2d. The plaintiff has not legal capacity to sue.

3d. There is a defect of parties plaintiff.

4th. There is a defect of parties defendant.

5th. Several causes of action have been improperly united.

6th. The complaint does not state facts sufficient to constitute a cause of action.

The court, at special term, sustained the demurrers, and ordered judgment for the defendants thereon, with leave to the plaintiff to amend on payment of costs.

The following opinion was delivered, at the special term, by the justice holding the same:

Daniels, J. The defendants Enoch H. Rosekrans and John H. White have demurred to the complaint in this action, the latter upon the ground that it fails to state facts sufficient to constitute a cause of action, and the former on that, as well as other grounds of demurrer. As the objection that the complaint states no cause of action, is the only one which it is deemed necessary to notice in disposing of the case, the others may as well be laid entirely out of view.

It appears by the complaint that the defendants Enoch H. Rosekrans and Albert N. Cheney, on the 8th day of October, 1860, entered into agreements with a corporation, formed under the laws of this State, to construct and operate a railroad from Saratoga to Lake Ontario, called the Adirondack Estate and Railroad Company, by which they severally agreed to sell and convey certain lands situated near to or upon the line of such railroad, and owned by them respectively, to that company. The land which such defendants agreed to sell and convey amounted, in the

aggregate, to upwards of one hundred thousand acres. When the purchase price was fully paid, which by the terms of the contracts the company agreed to pay in certain stipulated installments, the vendors agreed to convey the title to it, subject to taxes imposed after the execution and delivery of the contracts.

The company made default in the payment of the purchase price of the lands agreed to be sold and conveyed to it, and the vendors respectively commenced actions in this court for the purpose of securing the specific performance of the contracts by the company. The company answered the complaints in those actions, but its answers, on notice, and after a hearing before one of the justices of this court under section 247 of the Code, were stricken out, and judgments were directed for the plaintiffs in those actions. By these judgments the plaintiffs were respectively allowed to recover the amounts to accrue prospectively upon their contracts, as such amounts were mentioned and agreed to be paid in and by the terms of such contracts. This was objected to upon the argument of the demurrers as being entirely unwarranted by the law applicable to such cases. But even if that were legally true, it is not perceived how the error could be corrected in the present action. The law provides but two modes of correcting errors in legal proceedings. One by motion, where the error is one of form arising out of a failure to conform to the settled rules of practice of the court; the other by appeal, where the errors consist in the omission of the court itself to properly observe and apply the law affecting the rights involved in controversy, in making its adjudication upon them. But in this case, as the judgments, or the orders directing them, are set forth in full in the complaint, they do not exhibit any legal errors in the respect in which they are made the subjects of objection. For they do not direct a recovery of the amounts to become due upon the contracts, absolutely, at the time of their ren-

dition. But they ascertain the amounts prospectively to become due for principal and interest at the several times when the same were agreed to be paid by the company, and then direct that in case the same shall at those periods remain unpaid, then the plaintiffs in the actions shall have judgments for their recovery, and executions for their collection. There was not only nothing improper in this disposition of the cases, but on the other hand the correct practice relating to them was pursued. It was the manifest duty of the court sitting in equity to make a complete disposition of the cases in the judgments directed to be entered, and that could not be successfully accomplished in any other way. As no execution was to be issued for the collection of the installments subsequently accruing, under the terms of the contracts, until they had respectively matured, there is no way in which injustice could be done to the company by means of the directions for their recovery in case of their nonpayment, and no apprehension of either injustice or inconvenience appears at any time to have been entertained by the defendant in those actions on account of these directions. And while that continued to be the case, it is difficult to discover any authority that will permit the plaintiff, as a stockholder in the company, to take and maintain any proceeding whatever for the purpose of securing a change in any respect in such directions. Certainly no such proceeding can be successfully maintained by an independent action on his part.

The complaint alleges, that an execution was issued upon the judgment recovered by the defendant Albert N. Cheney against the property of the corporation, which was returned unsatisfied, and that an application was made by him thereupon for a sequestration of the property of the corporation, and the appointment of a receiver of it, and that such application was successful, and resulted in the appointment of N. Edson Sheldon as receiver, who ac-

cepted the appointment, and entered upon the discharge of his duties as receiver of the property of the corporation. Another receiver was afterwards appointed, upon the application of another judgment creditor whose execution had been returned unsatisfied. But as there could obviously be nothing for him to take as receiver while Sheldon continued to act under his appointment, it will be unnecessary to devote any attention to him in disposing of the objections presented by the demurrers. When Sheldon was appointed and qualified himself as such, and entered upon and continued in the discharge of his duties, by the express terms of the statute, he became a trustee not only for the creditor under whose application he was appointed, but for all the other creditors of the corporation whose property and effects he took. (3 *R. S. p.* 763, § 44; *p.* 770, § 78, *5th ed.*)

The receiver appointed under the application of Albert N. Cheney, applied to this court for directions to be given him in making sale of the property of the corporation which he had received, and become invested with as such, and an order was made giving him the directions applied for. These directions are assailed by the complaint on various grounds as unwarranted and unauthorized. One of these grounds is, that they were in effect procured by the defendant, Enoch H. Rosekrans, who then was, and still is a justice of this court. But it does not follow from that circumstance that he was not authorized to apply for the order, or that he could not draw the petition on which it was made, and the order itself, either before or after it was directed to be entered. For the receiver, whose conduct was to be directed, was just as much a trustee for him as he was for Cheney, under whose application he was appointed. He was a judgment creditor of the corporation when the receiver was appointed, and the receiver then became a trustee for all the creditors. The defendant Rosekrans was therefore interested in the subject matter

upon which the receiver was to be directed, and on which he was to be required to proceed. And although as a justice of this court he was generally prohibited from practice in it as an attorney or counselor, (3 *R. S.* 466, § 9, *5th ed.*,) yet that prohibition did not extend to or include the proceeding in question, because he was interested in the subject matter of it. And for that reason, by the express language of the statute, he was at liberty to act as it is alleged he did. (3 *R. S.* 465, § 4, *5th ed.*)

It is also alleged in the complaint that the defendant Rosekrans, by means of his official position, was able to exercise an improper influence in the proceedings, over the court in which they were taken. But it is not shown by any statement contained in the complaint, that his official position resulted in producing any different order or directions than the settled practice authorized the court to give, or than would have been given where any other person was interested in the proceedings to be taken. The order containing the receiver's directions recites that it was made upon the motion of Mr. Brown, as counsel for the applicant, who was the receiver, and it nowhere appears, from anything contained in it, as it is set out in the complaint, that the defendant Rosekrans had anything whatever to do with it. But even if he had all that the complaint charges to do with it, that would constitute no sufficient ground for setting it aside, because the statute allows so much to be done by a justice of this court in an action in which he may be a party, or in the subject matter of which he may be interested.

This order directing the conduct of the receiver concerning the sale to be made, of property of the corporation, is objected to as unauthorized, because it allowed the sale to be made upon fourteen days' notice posted in three public places, and published two weeks in one newspaper printed in the city of New York. But if faulty and objectionable in these respects, it was not owing to the

misconduct either of the defendant Enoch H. Rosekrans, or of Albert N. Cheney, or of the receiver, or the court itself that made the order. On the contrary, it was the fault of the law, for that provides that the receiver should have the power and authority, and be subject to the same obligations and duties, as receivers appointed upon the dissolution of a corporation, who have all the power and authority conferred by law upon trustees of an insolvent debtor, pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes. And these trustees are required to sell at public auction, all the estate, real and personal, vested in them which shall come to their hands, after giving fourteen days' notice of the time and place of sale, and publishing the same for two weeks in a newspaper printed in the county where the sale shall be made, (3 *R. S. p.* 763, § 44; *p.* 770, § 79; *p.* 115, § 9, *sub.* 4, *5th ed.*,) which the order directed the receiver to observe in selling the property of the corporation, and which his report, set out in the complaint and referred to for the purpose of showing the manner of and proceedings had at the sale, shows were fully complied with by him. It is alleged in the complaint that the defendant Rosekrans attended and advised with the receiver, as his counsel, at the time of and during the progress of the sale. But even if he did, that would form no reason for setting it aside, in the absence of any specific act of misconduct on his part, for he had a right to attend and advise the receiver, on account of the interest he had in the proceeding the latter was taking. To deny him that right might very seriously have prejudiced the interest he had in the collection of his debt, for which those proceedings were directed to be taken.

But even if the order directing the receiver as to the manner in which he should proceed in giving notice of and making the sale, were irregular or improvident, its correction should be sought by a motion before the court that made it. There is no authority that will sustain an

independent action for that purpose, even though the plaintiff was not a party to the proceeding in which the order was made. But the authority, so far as it goes, is most decidedly opposed to the maintenance of such an action. (*Brown* v. *Frost*, 10 *Paige*, 243. *Am. Ins. Co.* v. *Oakley*, 9 *id.* 259. *McCotter* v. *Jay*, 30 *N.Y. Rep.* 80. *Gould* v. *Mortimer*, 26 *How. Pr.* 167.)

The court that made the order had jurisdiction over the parties and the subject matter, by means of the proceedings already taken before it, and even though its order then made should prove to be irregular or improvident, it could not for those reasons be questioned or assailed in a collateral proceeding like the present action. (*People* v. *Sturtevant*, 5 *Seld.* 265, 266, 267.)

No difficulty stood in the way of the plaintiff, as a stockholder in the corporation, which would prevent him from applying to the court before which the proceedings were had, by motion to set them aside, if for any reason the propriety of such interference with them could be sustained. He was, by the express terms of the statute, a party to these proceedings, for the receiver was a trustee for the stockholders as well as the creditor, and equally bound to guard and subserve their interests as he was those of the creditors. And if he failed in his duties in that respect, or lent himself to the creditors to the unnecessary prejudice of the stockholders, there can be no room for doubt but the court before which the proceedings were taken, upon that being established, would have intervened on his application, or that of any other stockholder, and set them aside. It is just however, to add, in this connection, that the report of the receiver, which is incorporated into the complaint, and referred to as a reliable statement of his proceedings under the order, contains nothing tending to impeach either his fidelity or capacity in the discharge of the duties entrusted him. On the other hand, it shows a substantial, if not a literal com-

pliance with the directions given to him by the order. The fact that the property was sold for much less than it was worth, may prove to be unfortunate to the plaintiff and the other owners of the stock of the corporation, but it is one of those misfortunes which often attend the sale of an insolvent debtor's property when it is made under legal process for the payment of debts. That alone furnishes no ground for impeaching or setting aside the sale. If it did, sales of property under legal process and proceedings would soon become of so uncertain a character, as to be altogether unreliable for purchasers, and the result would be that the difference between the value and the price brought would be still further increased.

But the plaintiff claimed, upon the argument of the demurrer, that the allegations contained in the complaint showed that the order directing the receiver in his proceedings for the sale of the property was procured by fraud, and that such proceedings should be so far set aside as to turn the defendants Albert N. Cheney and Enoch H. Rosekrans into trustees for the benefit of the stockholders of the corporation, as to the excess payable to them on the sale of the property which they acquired through the receiver's sale, after the payment of the amounts due upon their judgments. This the plaintiff would probably be able to accomplish if the facts alleged in the complaint were sufficient to show that the orders of sale and confirmation were procured by fraud. These orders, as they are set out in the complaint, in view of the statutes affecting them, and under which they were made by the court, do not support the conclusion which the plaintiff endeavors to maintain. For, as before observed, the statutes sanction just such a course of proceeding as was adopted for the receiver, and which he followed in disposing of the property. No inference of fraud can therefore be supported by the proceedings themselves. The question will therefore necessarily arise upon this complaint, whether

the allegations in it present a case of fraud, outside of the papers themselves. If such a case is presented, it is one that may be redressed by action, and could not be in any other manner, since a trust is endeavored to be created in favor of the plaintiff in the moneys or property that may remain in the hands of the defendants Cheney and Rosekrans after the payment of their judgments. And that trust, it is claimed, should be declared on account of what is insisted upon as fraudulent misconduct on their part. Fraud invalidates all transactions, even those of the most solemn nature and character, as judgments and decrees of courts of justice. (*Shedden* v. *Patrick*, 28 *Eng. Law & Eq. Rep.* 56. *Story's Eq. Jur.* § 252. *Dobson* v. *Pearce*, 2 *Kern.* 156.) And it is equally true of proceedings and orders which result in producing direct injuries to the property and interests of others. Whether the plaintiff as a stockholder can maintain such an action as this without showing that the company itself is complicated in the transaction claimed to be fraudulent, and for that reason unwilling to maintain and vindicate his rights as a stockholder, it is not necessary at present to consider; for the facts alleged in the complaint will be found upon examination to be insufficient to support the charge of fraud in the procurement of either of the orders referred to. It is alleged that prior to the sale of the property by the receiver, the defendants Rosekrans and Cheney entered into some arrangement by which they were to jointly participate in the property which Cheney should buy at the sale. But nothing is stated indicating any impropriety in such an arrangement between them. The primary object of the sale was to satisfy their judgments, and either one or both of them were at liberty to bid upon and buy it, and that could be done by both together, or by one for the benefit of both, as they elected and agreed, without violating any legal or even ethical principle whatsoever. This allegation falls entirely short of making any fraudulent

disclosure whatever, and it is not strengthened in any manner by the circumstance afterwards alleged, that this arrangement was observed by a division of the property between them.

In a preceding portion of the complaint, it is alleged that these two defendants, "conspiring together, and for the purpose of securing to themselves the large property of the Adirondack Estate and Railroad Company by virtue of their judgments," induced the receiver "to apply to the Supreme Court by petition, for instructions as to the sale of the property" of the company. That the receiver was acting in their interest, and was under their control and direction, and that the petition and order made upon it was prepared by the defendant Rosekrans. But this does not aver that they induced the receiver to apply for such directions, or that he did so apply, in order to carry such conspiracy into effect, nor that the application or order had anything whatever to do do with the execution of such a purpose. The only act they induced the receiver to do was to apply to the court for instruction as to the sale of the property of the company. And there was clearly nothing fraudulent about that, even though these defendants may have conspired as the complaint alleges they did, as long as they did nothing to execute the conspiracy. No harm was done by it, either to the plaintiff or the corporation in which he was a stockholder. There was nothing unlawful or improper in the receiver applying to the court for directions, or in these defendants inducing him to make that application, as long as it is not alleged that it was done for the purpose of executing the conspiracy it was stated was made.

The complaint contains another allegation relating to the application for the order directing the receiver how to proceed in making the sale. In that it is stated that the defendant Rosekrans, acting for himself and Cheney, entered into a corrupt and collusive agreement with Hezron

A. Johnson and others, who claimed to act as the agents, or otherwise, for the Adirondack Estate and Railroad Company, by which said Rosekrans was permitted to obtain the order of this court, directing the manner and mode of sale of the property and interests of the company. And that by and through the same corrupt and collusive agreement, the sale was managed and conducted by the receiver, under the advice and counsel of Rosekrans, Cheney, Johnson and others. A radidal defect in this statement consists in the omission to show that the persons with whom the collusive and corrupt agreement is alleged to have been made, were authorized or empowered to act on the part of the company, or in any manner to compromise it, by anything they might consent these defendants should do. It is stated that they claimed to act as agents, or otherwise, for the company, not that they were agents, or in any manner in fact authorized to act for it, and the allegation might very well be true of any persons whatsoever having no semblance of connection with it. And all that it alleges they did was, that they permitted the defendants to obtain the orders that the court made, not that the agreement claimed to have been made, either secured, or contributed to, the making or procuring of the orders. In fact, their permission is not shown to have entered into the making of the orders, or to have had anything whatever to do with them. The allegation made concerning this agreement is materially defective in another respect, besides the failure to show that these persons had any connection with the company, and that is in not setting forth the substance of the agreement claimed to have been made. It would not be sufficient to procure the rescinding of an agreement, to allege, generally, that it was fraudulently made or procured. The specific manner in which the fraud was perpetrated, or agreed to be perpetrated, where the agreement is collusive, should be set forth. The practice governing pleadings in courts of justice requires

this to be done, to enable the party whose conduct is affected by it to take a proper issue upon it, and to know what proof he must be prepared to meet upon the trial of such issue, and also to enable the court to determine what the legal rights of the parties may be, growing out of the transaction in dispute. A complaint alleging generally that a collusive or corrupt agreement was made, injuriously affecting the plaintiff's rights or interests, would be clearly insufficient; so much so, that without amendment it would be dismissed as showing no cause of action, and that is the only allegation made in this case, charging actual fraud upon the defendants. Neither of the allegations in the complaint show that the defendants either accomplished anything unlawful by the use of lawful means, or made use of unlawful means to secure lawful results. It is not alleged in the allegations last considered, nor in any of those which precede it, that either of these orders were procured for any improper or unlawful purpose, nor that either of them was used for such a purpose. The order directing the receiver how to advertise and sell the property, and his proceedings under it, are relied upon as showing that such must have been the character of these orders. But as that order contains no provision or direction of an unlawful or improper nature, but conformed to the provisions of the statutes relating to and governing the proceedings, it can sustain no such conclusion as that which the plaintiff's counsel insists should be drawn from it.

Under no view that can be taken of these allegations, whether considered separately or combined together—for they are no more effectual when combined, than they are separately, having no necessary connection with each other—do they support the conclusion that either the order instructing the receiver, or that confirming his proceedings, was collusive or fraudulent, in the equitable sense of that term. The defendants must therefore have

judgment upon the demurrers, with leave to the plaintiff to amend in twenty days, on payment of costs.

From the order entered upon this decision, the plaintiff appealed to the general term.

E. W. Dodge, for the appellant. I. The theory of this action is that an act of gross injustice and wrong has been practised upon the plaintiff and other stockholders of the Adirondack Estate and Railroad Company. The proposition that the plaintiff cannot have redress as to matters of which he complains, by an original action in equity, is untenable.

And the authorities cited in the opinion of the learned justice at special term, to the effect that an irregular or improvident order made in an action can only be inquired into by motion in such action, are not applicable here, for it will be found that those cases were of such nature and in such condition that the court could intervene upon motion without prejudice to any acquired rights of innocent parties. The case now presented is not of that class. It is not pretended that the judgments in favor of Rosekrans and Cheney against the Adirondack Estate and Railroad Company, or any orders thereon predicated, if set aside by motion or otherwise, will be of any advantage to the plaintiff, because the receiver appointed in the case of Cheney, long before this action was commenced, had completed his labors and had been discharged by the court that appointed him, and an innocent and bona fide purchaser, to wit, the Adirondack Company, had acquired an absolute and vested right to the lands and road-bed formerly owned by the Adirondack Estate and Railroad Company, by conveyance from Rosekrans and Cheney, which title thus acquired could not be disturbed by any proceeding by motion in either of the actions brought by Rosekrans and Cheney upon the judgments under which such property was sold; and it will be seen that by the

complaint in this action, it is conceded that the Adirondack Company possesses a valid title which cannot be set aside. (*Willard's Eq. Jur.* 356. *Dobson* v. *Pearce*, 2 *Kern.* 165.)

II. The gravamen of this action is that Enoch H. Rosekrans and Albert N. Cheney, by trick, artifice and fraud, under the cover of judicial proceedings, obtained possession of all the property of the Adirondack Estate and Railroad Company, to the prejudice of the stockholders of such company, the plaintiff being one of them, and owning a large interest as such. If the case, as presented by the complaint, satisfies the court that a party in interest, and prejudiced by the legal proceedings taken by Rosekrans and Cheney, might have applied to the court in the actions brought by them to be protected against the wrong and injustice alleged by the complaint to have been done them, it is submitted that under the circumstances, while the relief cannot be granted in that form, nevertheless the right to redress is not lost, but Rosekrans and Cheney should be compelled to disgorge all that they have received in excess of whatever just claims they may have had against the company.

It will not be forgotten that from the beginning to the end of the litigation carried on by Rosekrans and Cheney against the Adirondack Estate and Railroad Company, Enoch H. Rosekrans was one of the justices of the Supreme Court of the 4th judicial district, and as such exerted an influence in his own court, which turns out to have operated with great oppression and injustice upon all adverse parties. Instead of an action at law to recover money due upon the two contracts, two actions in equity are brought for a specific performance, where a complete remedy at law existed. It will thus be seen that at the very incipient stage of the litigation a plain rule of law was thrust aside and ignored altogether, because in no other manner could Rosekrans and Cheney accomplish

their ulterior purpose; and furthermore, it was desirous that a trial by jury should be avoided, which was thus prevented, as also any trial in form, as anticipated, through the subsequent order of an associate justice of this court in that district, who ordered judgments, because, as alleged, the answers were sham, and as will be seen, judgments in both the Rosekrans and Cheney actions were ordered on the 19th day of February, 1862, directing executions to issue as the installments of money under the contracts became due, the last of which was the first day of January, 1864.

One singular feature in the history of this litigation against the railroad company is the fact that the plaintiffs therein did not, upon execution, sell any portion of the real estate of the company; the reason for this is apparent; in that event the company, under the statute, would have the right of redemption, to avoid which a resort was had to a receiver. It is admitted by the demurrers that Rosekrans acted as counsel in behalf of Cheney in procuring the order instructing the receiver as to the mode and terms of sale.

The order which "authorized, directed, advised and instructed" N. Edson Sheldon, the receiver, as to the mode and manner of sale of the real property of the Adirondack Estate and Railroad Company was made on the 28th day of November, 1862. And, as will be seen, the order declares the sum of $368,349.36 to be due upon the Rosekrans and Cheney judgments on the 22d day of November, 1862, whereas in point of fact by the terms of those judgments there had become due to Cheney $90,554.94, and to Rosekrans the sum of $94,082.03, being in the aggregate $184,636.97, while the balance of the claims in those actions was not to accrue by the terms of the decree, nor to be enforced before January 1, 1863, and January 1, 1864. It is needless to inquire whence the court derived the authority to direct the sale of the property of a judg-

ment debtor to satisfy a debt not due, by the terms of the decree, until two years afterwards. But it is proper to bear in mind that this extraordinary order was suggested and procured by Rosekrans as counsel for his associate, Cheney, and the object to be attained being thereby to drive away all competition at the receiver's sale, by enabling them to turn in that large amount as and for money to satisfy any bid made by Cheney.

It will be seen that at the receiver's sale, as appears by his report, the receiver sold the interest of the company in the lands purchased from Rosekrans and Cheney, and struck the same off to Cheney upon his bid of $100 only, while the road-bed and all of the lands of the Adirondack Estate and Railroad Company were struck off to Cheney at one bid and as an entirety, for the sum of $370,068.32, which, with the $100, covered the amount and interest which such receiver was required to realize. It is thus made to appear that by this unconscionable operation, Rosekrans and Cheney got back their own lands, being over 100,000 acres, of the admitted value of over $350,000, and for which they obtained their judgment, for the paltry sum of $100, while under the judgment they sweep out of existence the title of the company to other real estate of the value of $2,000,000 and upwards. By the order of the 28th day of November, 1862, which instructed receiver Sheldon how to conduct the sale, he was at liberty to unite with Alexander Seward, a hostile receiver from Oneida county; but Sheldon, as appears by his report, joined with Andrew Dexter, the successor of Seward, which it will be seen was not authorized by the terms of the order. The complaint charges that prior to the order of instruction to the receiver, Rosekrans, acting in his own behalf and as counsel for Cheney, entered into a corrupt and collusive agreement with Hezron A. Johnson and others, who claimed to act as agents or otherwise for the

company, by reason of which Rosekrans was permitted to obtain the order in the 4th district, directing the mode of sale of the property mentioned. And that upon the same collusive agreement, such sale was conducted under the advice and counsel of Rosekrans, Cheney, Johnson and others. The learned justice who wrote the opinion at the special term in this action takes exception to this allegation, because such allegation did not go to the extent to allege absolutely that the "persons with whom the corrupt and collusive agreement is alleged to have been made, were athorized or empowered to act on the part of the company or in any manner to compromise it, by anything they might consent these defendants should do." The fallacy of this reasoning will be apparent, because the company could confer no power upon an agent to compromise it or its stockholders; and again, it is enough to know that Rosekrans and Cheney, acting with Johnson and others upon the assumption that they did represent the railroad company, can make no difference in the opinion of the court as to the turpitude of the whole scheme, organized and carried out to the ruin of the company and the interest of its stockholders.

Why should not Rosekrans and Cheney be compelled to transfer to a receiver in this action the $1,400,000 of stock and bonds standing to their credit, as the consideration of the sale by them to the Adirondack Company of the road-bed and the lands of the Adirondack Estate and Railroad Company, especially as it will be seen that they also sold their own lands for the sum of $400,000, of which they received in cash $100,000, and mortgages to secure the balance? The jurisdiction of this court is ample to enable it to require Rosekrans and Cheney to make full pecuniary atonement for the wrong done to the plaintiff and others, the stockholders of the Adirondack Estate and Railroad Company. (*Story's Eq. Jur.* § 187 *et seq.*)

John O. Mott, for the respondents. The complaint shows that Cheney and Rosekrans severally obtained regular judgments against the Adirondack Estate and Railroad Company, after appearance and answer by the defendant; and that upon petition of Cheney, after execution upon this judgment was returned unsatisfied, one Sheldon was appointed receiver of the property of the corporation, under section 36, article 2, title 4, chapter 8, part 3, of the Revised Statutes. It also shows that, upon the petition of one Chadwick, another judgment creditor of the corporation, the execution upon which had been returned unsatisfied, one Dexter was also appointed a receiver of the property of the corporation, under the same statute. These receivers severally qualified, and took upon themselves the discharge of the duties of the office. They were thus, by chapter 403 of the laws of 1860, section 1, (*Laws of* 1860, *p.* 699,) possessed of all the powers, and subject to the obligations and duties provided for receivers appointed on the voluntary dissolution of corporations. These latter receivers (2 *R. S.* 490, *Edm. ed., orig. paging* 469, § 67) are made trustees of the estate of the corporation, for the benefit of its creditors and shareholders; and by section 68, are declared to have the powers conferred by law upon trustees of insolvent debtors, under chapter 5, part 2 of the Revised Statutes. This last statute, (2 *R. S.* 43, *Edm. ed., orig. paging* 41,) section 7, subdivision 4, requires the trustees to sell at public auction, from time to time, all the estate, real and personal, vested in them, after giving fourteen days' notice of the time and place of sale, and publishing the same for two weeks in a newspaper printed in the county where the sale shall be made. The statute does not declare in what county the sale of real estate shall be made, but section 46 makes the trustees subject to the order of the Supreme Court. The statute and the rule of the court, relating to sales of real estate under mortgage foreclosure and on execution, have no application to sales

made by trustees of insolvent debtors, or receivers of insolvent corporations. In foreclosure cases, the court may order the sale made in another county than the one where mortgaged premises are situated, (2 *R. S.* 200, § 157;) and inasmuch as the statute above cited (§ 46) has made the trustees subject to the order of the Supreme Court, and has thus conferred upon that court jurisdiction to determine in what manner the sale shall be made, its decision is binding in every court, until reversed. See the remarks of Johnson, J., in *People* v. *Sturtevant*, (5 *Seld.* 266, 267.) It cannot be questioned collaterally.

The complaint in this case shows that the sale of the real estate of the corporation, by the receivers, was in exact conformity with the provisions of section 7, subdivision 4, of 2 Revised Statutes, 43, above cited; that it was in exact conformity with the order of the court, and was, therefore, regular.

The court also had power to confirm the sale, and the complaint shows that it was duly confirmed. Within the case above cited, it cannot be questioned collaterally by any one, unless impeached for fraud. It is to be observed that there is no allegation in the complaint that the order of the court giving instructions to Sheldon, receiver, as to the sale, was obtained through any misrepresentations or concealment of facts; and it is therefore to be assumed that the order was made upon a full view of all the circumstances affecting the subject, and that it was wisely ordered, not only for the benefit of the creditors of the corporation, but also for its stockholders. It is also to be observed that the complaint contains no allegations that any act was done by either Rosekrans, Cheney, or the receiver, to prevent competition at the sale, or to interfere with or discourage bidders; and the report of the receiver, set out in the complaint, discloses the fact that the sale was in all respects just and fair, and in conformity with the order of the court and the statute. Nor is it alleged

in the complaint that the board of directors or stockholders of the corporation, including the plaintiff, had not full knowledge of the order of the court and of the time and place of sale, and the nature of the notice of sale and description of the property; nor is it alleged that the property would have brought more, in the opinion and belief of the plaintiff, had the sale been made at any other place or under any other notice or description. The plaintiff's claim for relief is based upon the iteration and reiteration of the words fraud, collusion, conspiracy, and unfair advantage, which have no meaning or force, when viewed in connection with the facts alleged, and are rendered perfectly harmless when the allegations of the complaint to which they are applied are considered. I proceed to consider these allegations of fraud, collusion, and conspiracy, in the order of the time of the events to which they are applied in the complaint. It is alleged, "that prior to the sale by the receiver," (but at what particular time is not stated,) Rosekrans and Cheney entered into some arrangement, whereby said Rosekrans was to participate with said Cheney in the benefits resulting from such bids, and was to become and to be with said Cheney, joint owner and tenant in common of all the lands and interests at law and in equity to be acquired at such sale, and that pursuant to such understanding and agreement the said Rosekrans made and executed the satisfaction piece and receipt for his judgment. This agreement is not alleged to have been fraudulent; and, indeed, in view of the other facts disclosed in the complaint, it cannot be conceived how it could be so. Rosekrans and Cheney, as the complaint discloses, made their several contracts with the corporation for the sale of lands on the same day, October 8th, 1860; they obtained their several judgments against the corporation on the same day, February 19th, 1862; the records of judgment in the two actions were filed and the judgments docketed on the same day, February 22d, 1862;

and it is to be inferred that the judgments were docketed at the same time of day, giving neither the preference or priority of lien, as the court adjudged that the two judgments were the first liens on the real estate of the corporation. It may be asked what course was more natural and appropriate than that two judgment creditors thus situated should make an agreement, such as is alleged they did make. By this agreement, as well as by the fact that Rosekrans was a judgment creditor of the corporation whose property was to be sequestrated by the receiver's sale, he became and was interested in the sale to be made, and he had the right to act as counsel for himself, and to protect his own interests, and was not excluded from such action by any statute or rule of law; and the allegations in the complaint, "that the petition (for the receiver to obtain the instructions of the court as to the sale) was prepared by said Rosekrans in the action in which said Cheney was plaintiff, as was also the original draft of the order thereon founded," is wholly innoxious, and without force. The action and proceedings for sequestration, although in form in Cheney's name, were, in law, the action and proceedings of the defendant Rosekrans also.

But it is alleged "that prior to the sale by the receiver, the said Rosekrans and Cheney conspiring together, and for the purpose of securing to themselves the large property of the corporation, by virtue of their judgments, induced the receiver, Sheldon, to apply to the court, by petition, for instructions as to the sale of the property." With all respect for everybody who had any agency in drafting the complaint, it is submitted that the allegation is simply absurd. It has already been shown that the receiver had, by law, the right, and was required to make the sale, as he did, without the instructions of the court; and in the absence of any allegation that the petitions contained any misstatement or concealment of facts, or of any corruption on the part of the court, it is impossible

to predicate an allegation of fraud or conspiracy of any kind upon the act of applying to the court for instructions to the receiver as to the sale; and the words "conspiring together for the purpose of securing to themselves the large property of the corporation," have no meaning in law or fact, in the connection in which they are used.

The creditors of the corporation had the right. It was lawful for them to agree to get the property as low as they could, (to conspire together for that purpose, if the plaintiff prefers so to express it,) if they did no act to impose upon the court, or any act to interfere with bidders at the sale, or to prevent competition. *Vendor vendit quam maximo potest emptor emit quam mimmo potest;* and in the absence of all acts of fraud, a purchase at the lowest price is not to be impeached or questioned. The allegation "that the receiver, Sheldon, was acting in the interest of the said Cheney and Rosekrans, and under their control and direction," is equally harmless as against them and the receiver, and is also absurd. By the statute already referred to, the receiver was made the trustee for the creditors and stockholders of the corporation. He was bound by law to act in the interest of the creditors to the extent of selling the property, and was authorized to obey their directions to the extent of asking the court for instructions, upon a truthful representation of all the facts affecting the property in his hands, and there is no allegation in the complaint that he did more than this. The complaint shows that the court made the order, the court gave its instructions to its receiver, the instructions were in accordance with the statute, the receiver complied with those instructions to the letter, and the court confirmed the sale. It must be borne in mind that there is no allegation that the board of directors of the corporation had not full knowledge of all the particulars of the proceedings for the sale, and of the sale, and that there is no allegation that the plaintiff did not know of the application

by the receiver for instructions as to the sale, or of the sale, at the time it was made. All he alleges on that subject is, "that he did not know, until November, 1866, that the fraud and collusion had been practised as stated, (which is shown not to have existed,) and that he did not know that the sale was conducted as stated; that is, that he did not know how the receiver offered the property for sale at the auction, first in parcels, and then as a whole. In view of these circumstances, and the additional fact that the defendants Rosekrans and Cheney subsequently sold the property purchased at the receiver's sale to a new corporation, (the Adirondack Company,) a *bona fide* purchase, it is a matter of no force that they purchased the property at a receiver's sale, at a price below its alleged value, or that they made large profits upon the resale. The sale, if irregular, cannot be set aside. (*See Clarke* v. *Davenport*, 1 *Bosw.* 95, 120, 121, *and authorities cited.*) If the sale was void, the plaintiff has no cause of action. There are other allegations in the complaint which it may be proper, although unnecessary, to notice. The allegation that the defendant Rosekrans was a justice of the Supreme Court in the fourth district, and had an unfair advantage in procuring the order for the sale and the order for confirmation, is of no force whatever. His right to the office is certainly unquestioned, and his legal rights as a judgment creditor of the corporation are not thereby destroyed. No issue can be taken upon such an allegation. It is not on allegations of a fact, but of an inference of the plaintiff, sustained by no allegation of fact to support it. If denied, it cannot be proved by evidence of any fact alleged. As an inference, the allegation of unfair advantage is not justified by any fact alleged; and equally idle and senseless is the allegation "that the defendant Rosekrans, acting in his own behalf and as counsel for Cheney, entered into a corrupt and collusive agreement with one Hezron A. Johnson and others, who claimed to

act as agents, or otherwise, for the said Adirondack Estate and Railroad Company, by which he was permitted to obtain the orders of the court for sale in the fourth district." "Johnson and others" were not the agents of the corporation. If they had been, the plaintiff would so have alleged. They were strangers to the corporation and its creditors—mere outsiders. A corrupt and collusive agreement with them, for any purpose, would have been ineffectual and ridiculous. They had no consent to give, and if given it was of no effect. If they were the agents of the corporation, and gave consent to the orders, the corporation is bound by the acts of its agents, and of course the plaintiff has no ground of action. But it is not alleged that either the receiver or the court had knowledge of any such agreement, or that the action of the court was based upon it, nor how the result would have been changed had the agreement not been made and the consent not given. It seems to have been the idea of the one who drew the complaint, that the plaintiff would be sure of having some kind of relief if he interspersed his allegations with the words fraud, collusion, corrupt agreement, and unfair advantage, without regard to the subjects with which they were connected, or alleging how they affected the interests of the plaintiff. If the allegation is correct, "that the order directing the sale, and the sale, was void and in violation of the statute," no title passed, and the plaintiff has no ground of action. (1 *Cowen*, 735, *and cases cited.*)

It should be remarked, also, that there is no allegation of fraud, collusion, conspiracy, or being subject to undue influences by the receiver Dexter, appointed in the fifth district; and the complaint shows that he united in the sale with Sheldon, and in the conveyance of the property to Cheney, and under the statute his sale, without the order of the court, made with full knowledge on the part of the corporation and its stockholders, including the plaintiff, which is not denied, passed a perfect title to the

purchaser. The pleader's ideas in regard to the doctrine of subrogation, are about as confused as his notions in regard to fraud and conspiracy, and corrupt agreements with strangers.

The idea of partial subrogation, and that of total subrogation, to the position of a creditor, without paying his debt, or offering to pay it, is novel. It has generally been supposed that the right existed only upon condition that the one who sought to enforce it, paid the debt of the one whose place he sought to occupy. It will be perceived that the plaintiff asks for himself and his associates that they may be subrogated only to a part of the defendants' position, and that he makes no offer to pay their judgments, which have been discharged or the mortgage which they have against the new corporation. The omission of any offer to pay the mortgage is fatal to the plaintiff's action. But the doctrine of subrogation has no application to such a case as this. Again, it does not appear that the corporation—the Adirondack Estate and Railroad Company—has been dissolved. If it has not, and there has been any fraud practised, by which its property has been sacrificed, or the title to it clouded, the remedy is by the corporation, and not by individual stockholders, or the collective body of stockholders; and if the corporation has been dissolved, the right of action, if any exists, is in the receivers, (who are by statute made trustees of the property of the corporation,) who do not appear to have been discharged. The stockholders, also, are not entitled to any of the proceeds of the sequestered estate until all the creditors of the corporation have had their debts satisfied; and there is no allegation that there are no other creditors, or that there would be a surplus to be divided among the stockholders, if the sale were set aside and the property resold.

Again; the remedy of the plaintiff, if he is entitled to relief, is by application in the proceedings for sequestra-

tion, and not by independent action. (30 *N. Y. Rep.* 80. 10 *Paige*, 243.) Upon a motion for a resale of the property, on the ground of inadequacy of consideration, the party moving would be required to offer a larger sum. In this case no such offer is made.

In any view, the demurrer to the complaint should be sustained, and judgment affirmed.

By the Court, CLERKE, P. J. I have nothing to add to the opinion of the justice at special term. He overruled the demurrers, and his decision is supported by unanswerable reasoning.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 5, 1869. *Clerke, Sutherland* and *Ingraham*, Justices.]

GILMARTIN *vs.* THE MAYOR &C. OF THE CITY OF NEW YORK.

If a servant does, without special orders, an act of such a nature that he is justified in doing it, as between him and his master, without an express order, the master is liable for damages sustained by an individual in consequence of the act being done in an unskillful manner.

Thus where the defendants' gardener, in attempting to take down a liberty pole, in a public park, which had become dangerous, did it so unskillfully that it was precipitated against a telegraph pole which was thereby broken off and cast against the plaintiff's daughter, causing her death; *Held* that the defendants were liable, although the gardener had received no express orders to remove the pole, from the officer having charge of the public parks.

APPEAL by the defendants from a judgment entered at a special term on the verdict of a jury.

The action was brought to recover damages for loss of services, and expenses, occasioned by the death of the plaintiff's daughter, a minor, under the following circum-

stances: She was passing along Broadway, on the 27th of June, 1865, at the time when a pole or flag-staff standing in the city hall park was being cut or pulled down. It was claimed by the plaintiff that several of the officers of the defendants, who were charged with the care of the park, were present and assisted in taking down the pole. The pole fell against the telegraph wire, and thereby a telegraph pole, situated at the corner of Murray street and Broadway, was pulled over and fell upon her, causing injury, of which she afterward died. The testimony was that the pole was cut down by men and boys, after working hours; that Michael Reilly, a gardener, employed by the defendants, had "something to do with it." That the keeper of the park, Donohue, had not received or given any order for the removal of the pole. That no order for its removal had been given by the superintendent of lands and places, whose duty it would have been to have ordered such removal, if it had been desired. That it was no part of the duty of Reilly, the gardener, to undertake the removal of the pole. It also appears that the telegraph pole was maintained and controlled by the Metropolitan Police Department; that it was rotten at the base where it broke off. The action was tried by a jury. It was admitted by the defendants' counsel, on the trial, that the defendants, on the 27th day of June, 1865, were the owners of the city hall park, in the city of New York, and in possession thereof. And it was consented that the plaintiff might read in evidence, on his behalf, the ordinances of the defendants, as published by them, relevant to the issues herein; subject, however, to any objections the defendants might make as to relevancy or otherwise.

The plaintiff's counsel then read in evidence an extract from the ordinances of the city corporation, specifying the duties of the superintendent of public parks and places, passed May 20, 1849, (chapter 5, section 29,) as follows: "An ordinance organizing the departments of the munici-

pal government of the city of New York, and prescribing their powers and duties. (Approved May 20, 1849.)

Chapter V, section 29. This bureau, the chief officer of which shall be called the superintendent of lands and places, is charged with the duty of inspecting the condition of, and superintending the public grounds and places belonging to the corporation.

§ 71. He shall exercise a constant inspection and supervision of the public grounds and parks, and of keeping the same in proper order, and shall, from time to time, suggest and report to the street commissioner such improvements therein as may be necessary and proper, with estimate of the expense thereof.

§ 76. May appoint a foreman (amended January 7, 1865) and two keepers of the city hall park at three dollars per day, and may employ, from time to time, such additional labor as may be necessary to keep the public grounds and parks in proper order." (*Revised Ordinances, approved December* 19, 1862.)

When the plaintiff rested, the defendants' counsel moved to dismiss the complaint, upon the ground that the action was brought to recover against the corporation for the negligence of its officers, employees or agents, in negligently performing its duty in removing from the premises the stick of timber or pole theretofore erected; and that to establish the right of the plaintiff to recover, it must be shown affirmatively that this was done by one of the employees or agents of the city government; and that there was no testimony to that effect, except that of Mr. Donohue, the keeper of the city hall park, who stated that one Edward Reilly, the gardener, was at or about this pole; that in the same testimony it was shown that he, Donohue, was duly appointed by the street commissioner, keeper of the city hall park, and that he had men in his charge to take care of the grounds, and that no order had been received by him from Mr. Ward, the superintendent

of lands and places, to remove this liberty pole, nor had he, Donohue, given any order of that kind to any person who was under his charge. The motion was denied, and the defendants excepted.

The defendants also requested the court to charge that if the jury believed the telegraph pole would not have fallen except from the fact of its being unsound, then the plaintiff could not recover. The court denied the request, and exception was taken. The defendants further requested the court to charge that the cutting down a liberty pole was not a repair such as Reilly might, without any specific direction, cause to be done. The court denied the request, and exception was taken. The jury found a verdict in favor of the plaintiff, for $1100.

Richard O'Gorman and *John K. Hackett*, for the appellants. I. The motion to dismiss the complaint should have been granted. 1. It was incumbent upon the plaintiff to establish affirmatively that the removal of the liberty pole was done by the corporation, through its officers. There is no such proof in the case. It is proven that "men and boys" were engaged in pulling it down. That it was done after "working hours." The only testimony tending to connect any officer of the city with the occurrence is, that Michael Reilly, gardener of the park, had "something to do with it." What that something was, whether he directed the removal, or remonstrated against it, does not appear. It is therefore submitted, that this testimony is entirely insufficient to connect the corporation with the occurrence. 2. But if it be conceded that Reilly directed the removal of the liberty pole, the corporation is not liable. (*a.*) Because the removal of the pole was not within the scope of Reilly's duties as gardener. This fact is proven affirmatively by the testimony of Ward, the superintendent of lands and places, and of Donohue, the keeper of the park. (*b.*) Because he was

not directed to remove the pole by the defendants. Mr. Ward, the only person from whom such an order could properly issue to him, testifies that no such order was issued. (*c.*) It also appears that the removal of the pole was done "after working hours," at a time when the corporation had ceased to control or direct the occupation of their employees. The negligence by which the plaintiff suffered was therefore committed by Reilly while engaged in an employment not authorized or directed by the defendants. A corporation is liable for a tortious act committed by an agent pursuant to its direction in relation to matters within the scope of its powers; but not for any unauthorized act of its officers, though done *colore officii.* (*Angell & Ames on Corporations*, 250, 330. *Boom* v. *City of Utica*, 2 *Barb.* 104. *Mayor* v. *Cunliff*, 2 *N. Y. Rep.* 165.) 3. The unsoundness of the telegraph pole was the immediate cause of the injury suffered. The falling of the liberty pole was the remote cause. "*In jure non remota causa sed proxima spectatur.*" (*Brown's Legal Maxims*, 202.) Lord Bacon says: "It were infinite for the law to judge the cause of causes and their impulsions one of another: therefore it contenteth itself with the immediate cause without looking to any further degree." (*Bac. Max. Reg.* 1. *Burrill's Law Dic.* "*Causa.*" 3 *Barr's Rep.* 470. 6 *Adol. & Ellis*, 75. 11 *John.* 15.)

Joseph M. Pray, for the respondent. I. The motion to dismiss the complaint, when the plaintiff rested, was properly denied. 1. There was evidence sufficient to sustain a verdict that the defendants had caused the injury complained of, and that it occurred through their negligence. (*a.*) The defendants had charge of the public park. It was under their exclusive control, and all improvements and repairs therein could only be carried on and all obstructions removed by their authority. (*Wendell* v. *The Mayor &c. of Troy*, 39 *Barb.* 329. *Conrad* v. *Trustees of Ithaca*, 16

N. Y. Rep. 159, *and note. Hickok* v. *Trustees of Village of Plattsburgh, Id. Barton* v. *City of Syracuse,* 36 *id.* 54. *See Ordinance, fol.* 84.) They were bound to remove the pole if it became dangerous to human life, and to remove it with proper safeguards. (*Austin* v. *H. R. R. Co.,* 25 *N. Y. Rep.* 334. *Conrad* v. *Trustees of Ithaca,* 16 *id.* 159. *Grant* v. *City of Brooklyn,* 41 *Barb.* 381.) (*b.*) The testimony shows satisfactorily that they were acting, in so doing, by their usual agents. Michael Reilly, the gardener, was engaged about it; James Donohue, park-keeper, was present and advising. (*Drew* v. *The Sixth Avenue Railroad,* 26 *N. Y. Rep.* 49. *Devin* v. *Patchin, Id.* 441.) (*c.*) But they carelessly and negligently allowed a crowd of men and boys to pull the rope, apparently for sport, and, without paying attention to the wire, they pulled the rope towards it. In so doing, they not only pulled down the wire belonging to the city, crossing the park, but also thereby pulled down the pole to which the wire was attached on Murray street, and caused it to fall upon the deceased. (*Cases above cited. Benson* v. *Suarez,* 19 *Abb.* 61. *Althorf* v. *Wolf,* 22 *N. Y. Rep.* 355.)

II. The motion to dismiss the complaint at the close of the testimony, was properly denied. 1. The defendants' responsibility was then clearer than before. 2. The proof of the falling of the liberty pole upon the wire, is sufficient and satisfactory. 3. There was at least evidence tending to prove material portions of the plaintiff's case, and therefore the case was properly sent to the jury. (*Mallory* v. *The Tioga Railroad Co.,* 1 *Transcript Appeals,* 204. *Ernst* v. *Hudson River Railroad Co.,* 35 *N. Y. Rep.* 35, 40. *Cook* v. *N. Y. Central Railroad Co.,* 3 *Trans. Appeals,* 8. *Wolfkiel* v. *Sixth Avenue Railroad,* 5 *id.* 219. *Van Rensselaer* v. *Jewett,* 2 *N. Y. Rep.* 135.)

III. The condition of the telegraph pole does not affect the case; especially, as by the defendants' testimony it belonged to them; and the court properly refused to charge

as requested by the defendants' counsel. 2. The court properly refused to charge as requested by the defendants, in reference to cutting down the liberty pole. (*a.*) The defendants were required to see that the pole was removed in a proper manner, and under proper superintendence. (*See Ordinances, fol.* 84; *Davenport* v. *Ruckman, &c.*, 37 *N. Y. Rep.* 568; *Barton* v. *City of Syracuse*, 36 *id.* 54; *Grant* v. *City of Brooklyn*, 41 *Barb.* 381; *Hyatt* v. *Trustees of Rondout*, 44 *id.* 385.) (*b.*) The defendants are responsible for the act of Reilly, if they allowed him to cut the pole down. (*Althorf* v. *Wolf*, 25 *N. Y. Rep.* 355.)

IV. The damages found by the jury were not excessive, and were sustained by the evidence; and no objection was taken at the trial as to the sufficiency of the evidence on the question of damages. (*Drew* v. *Sixth Avenue Railroad*, 26 *N. Y. Rep.* 49.)

V. No exception was taken to the charge of the court, and no other requests to charge were made by the defendants. Without such requests and exception, the defendants are to be deemed to have acquiesced in the charge. (*Cook* v. *N. Y. Cent. Railroad*, 3 *Trans. Appeals*, 11. *Mallory* v. *Tioga Railroad*, 1 *id.* 204. *Winchell* v. *Hicks*, 18 *N. Y. Rep.* 558. *The People* v. *Cook*, 8 *id.* 78.)

VI. All the other objections taken at the trial were properly overruled.

VII. The appeal is taken from the judgment only, and not from the decision on the motion for a new trial, and the verdict, therefore, cannot be disturbed upon the ground that it is against the weight of evidence.

By the Court, Geo. G. Barnard, J. The defendants had sole charge of the city hall park, and were bound to so manage it that life should be protected. If the pole, the removal of which caused the injury to the plaintiff's daughter, was dangerous, the defendants were bound to

remove it. If for any reason the defendants wished its removal, they had the power to remove it. In any case, they were bound to remove it carefully. The defendants' gardener, on removing it, did it so unskillfully that it was precipitated against a telegraph pole, which was thereby broken off and cast against the plaintiff's daughter, causing her death. The pole which was removed had been put up for a specific purpose, which had ceased to exist, and it appears to have been dangerous, as it broke into pieces in falling. Under these circumstances, the gardener was justified in the removal, as to the defendants, without an express order, and this would make the defendants liable if the act was unskillfully done. (*Harlow* v. *Humiston*, 6 *Cowen*, 189.)

It is entirely immaterial whether the injury was caused by the liberty pole, directly, or by the telegraph pole being driven by the liberty pole. It was the unskillful removal of the liberty pole which caused the injury.

Judgment affirmed, with costs.

[New York General Term, June 7, 1869. *Clerke*, *Geo. G. Barnard* and *Cardozo*, Justices.]

McVICKER *vs.* ROSS and others.

HARRIS *vs.* THE SAME.

WILLIAMS *vs.* THE SAME.

In the matter of HASKIN *vs.* ROSS and others.

FARGO and others *vs.* BLATCHFORD and others.

In case of the consolidation of two joint stock companies, although a dissenting shareholder, like a retiring partner in an ordinary partnership, is not obliged, in the absence of an express agreement to that effect, to surrender his interest in the property to his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale, in the ordinary manner of closing up partnerships where there is no express stipulation; yet where the amount of dissentient stock is quite inconsiderable, in comparison with the stock whose owners have acquiesced in the agreement of consolidation, the court will order the consolidated company to give a bond with sureties, conditioned that, upon the final judgment, all the property transferred to it shall, if so required by the judgment, be delivered into the custody of the court, for the protection of all the shareholders.

Dissenting stockholders have no absolute right to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver. If they are entitled to have the property sold, their right is to have it sold when they have recovered judgment.

All that they can claim is, that the property shall be preserved until judgment, so that their rights, as then ascertained and declared, may be enforced.

MOTION, in the first three cases, for the appointment of a receiver of the property of the Merchants' Union Express Company, and in the first four cases for an order removing a receiver of a certain portion of such property, who was appointed by an order made in the fourth action.

CARDOZO, J. In the first three of the above entitled cases, a motion is made to appoint a receiver of the property of the Merchants' Union Express Company, and in them and in the matter fourthly above entitled, I am asked to remove Mr. William F. Allen from the position of receiver of a certain portion of such property, to which he was appointed by an order made in the suit of *Haskin* v. *Ross, &c.* I

have concluded to deny these applications, except as hereafter stated, for the following reasons:

I think that at this stage of the litigation the relief sought is, under the circumstances, unnecessary for the full protection of the plaintiffs, and would be a needless hardship upon some of the defendants. The amount of dissentient stock is quite inconsiderable, in comparison with the large amount of stock which has acquiesced in the agreement of consolidation; and while I am of the opinion that a dissenting shareholder in these joint stock companies, like a retiring partner in an ordinary partnership, is not to be obliged, certainly, at all events, in the absence of express agreement to that effect, to surrender his interest in the property to his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale in the only manner recognized by law for closing up partnerships in the absence of express stipulation; yet the great disparity between the amount of stock assenting and that dissenting, and a just regard for the interests of all the parties concerned in the consolidated company, lead me to the conclusion that such an order should, and I think can, now be made, without disturbing the present condition of affairs, as will make every discontented shareholder perfectly safe until a final decree can be made, settling and adjudging definitely the rights of the parties.

With that view, while denying the motion for a receiver, and vacating the injunction issued, except so far as to prevent any attempt to forfeit stock of dissenting shareholders, I shall do so only on condition that the defendants furnish a bond with sureties, to be approved by one of the justices of this court, conditioned that, upon the final judgment, all the property which belonged to the Merchants' Union Express Company, and which was transferred to the consolidated company, shall, if so required by the judgment, be delivered into the custody of the

court, through such officer for that purpose as it may appoint; and also that in case by use, lapse of time or otherwise, any of the property shall have diminished in value, then to make the same, by a payment in cash, up to the full value to be ascertained as hereinafter mentioned. This, I think, will protect everybody, without doing harm to any one. The plaintiffs have no absolute right, though it is very common, and indeed most usual to do so, to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver. Their right, if they are entitled to have the property sold, is to have it sold when they have recovered judgment. All that they can claim is, that the property shall be preserved until judgment, so that their rights, as then ascertained and declared, may be enforced.

I do not understand the case of *Spicer* v. *Haresceup*, decided by Judge Daly on 30th April, to which Mr. Sewell invited my attention, after the argument, to conflict with the general rule that a sale is the only method of closing up a partnership, if the partners cannot agree among themselves upon a division, or some other method. I understand Judge Daly to have done substantially what I have determined to do here. He obliged the defendant to give security, so that the plaintiff should be safe when final judgment was obtained.

To carry my views into effect, there must be a reference to James M. Sweeny, to ascertain and report all the property of every name and description, and the value of each item, which belonged to the Merchants' Union Express Company, and which was transferred to the consolidated company. And upon the coming in of that report, I will fix the amount of the bond which the consolidated company must give as a condition of retaining the property pending the litigation; thus in effect constituting them receivers *pendente lite*.

I have intentionally avoided expressing any opinion on

the merits, or on the various questions discussed before me; believing that in the view I have taken of the present necessities of the case, I ought to leave them to be disposed of upon a regular trial.

Respecting the application to remove Judge Allen from the partial receivership which he holds, I think it is sufficient to say that while I do not mean to be understood as approving the method which the parties took to procure that receivership, yet in view of the fact that the receiver is the officer of the court, and under its control, and that the gentleman who holds the position is personally wholly unobjectionable, and might very well have been selected for such a trust, in a perfectly proper and legitimately conducted proceeding, I do not think that it is necessary for me to make any change, at present. This leaves only the case of *Fargo &c.* v. *Blatchford &c.*, in which the plaintiffs seek to have the consolidation agreement confirmed and to restrain the suits brought to impeach it, and in which they ask the continuation of the preliminary injunction which has been granted.

It may be doubted whether that action can be sustained, but I do not think it necessary to determine the question; because, after the disposition I have made of the other cases, and in view of the fact that the defendants in this suit can obtain any affirmative relief that they may show themselves entitled to, whether of the character demanded in their complaints in the other cases or otherwise, and that the litigation will be presented in a more convenient form than if conducted in many suits, no harm can be occasioned by continuing the injunction in this case, and therefore I think it best not to interfere, on a mere motion, with the temporary order, but to leave the defendants to the more solemn and regular course of a demurrer, if they see fit, instead of litigating the whole merits of the controversy, as they can do, in the convenient form which the plaintiffs afford them by this action,

to insist upon their right to a determination of the legal objections which they raise to the complaint.

An order to carry these views into effect may be prepared by either party, and may be settled on notice, and either party may make such suggestions for my consideration as he may desire, respecting the provisions of the bond and the order of reference hereinbefore mentioned.

The costs of the motions will be taxed in the causes, and abide the event thereof.

[NEW YORK SPECIAL TERM, August 2, 1869. *Cardozo*, Justice.]

---

55 251
125a 577
55b 251
47ap475
47ap476

NICHOLAS WALSH, executor &c., *vs.* FRANCIS SEXTON.

Certificates of stock, and coupon government bonds, will pass by delivery *mortis causa*, without any writing.

Thus where the plaintiff's testatrix, during her last illness, having examined certain certificates of bank and railroad stock, and coupon government bonds, owned by her, sent for her husband, the defendant, and on his coming into the room, she handed him the box containing the securities, with the key thereof, saying that she gave him the box and its contents; that they would be of use to him after her death; and the box and its contents were taken and retained by him; *Held* that the title to the securities passed to the defendant, although no transfer of the stock was signed, and no power authorizing such transfer was signed by the testatrix.

ACTION to recover the value of certain shares of the stock of the Chatham Bank, and of the capital stock of the Third Avenue Railroad Company, and coupon bonds of the United States government, loan of 1861, left by the plaintiff's testatrix, and conceded to have been her property at the time of her marriage with the defendant. The defense set up in the answer was, that on or about the first day of April, 1865, Eliza Sexton, the plaintiff's testatrix, then being sick of a fatal illness, and in expecta-

tion of her speedy decease, desiring to transfer to the defendant (who was then her husband) the property described in the complaint, for his own use and benefit thereafter, in consideration of her love and affection toward him, gave the said property to the defendant, by delivering to him the certificates of said bank stock and railroad stock, and the coupon bonds mentioned in the complaint, at the same time directing him to have and keep the same as and for his own property; and that the same thereafter, with the knowledge and consent of the said Eliza Sexton, until her decease, was continuously kept by the defendant in his possession, and ever since has been so kept by him as his individual property. And the defendant claimed that by reason of the premises the said stock and bonds had become his property. The certificates, on their face, are made "transferable only by her or her attorney, on surrender of this certificate."

Upon the trial, the defendant offered to prove "that in the last weeks of March, 1865, before the death of Mrs. Sexton, the testatrix, she examined this stock in a tin box; that she sent a nurse, then in the room with her, for her husband; that he came into the room; that she then handed him the box, together with the key thereof, and stated to him that she gave him the box and its contents; that they would be of use to him after her death; that the box and property was then taken by him, and retained by him, and is still in his possession."

It was conceded that no transfer of the stock was signed, and no power of attorney authorizing such transfer was signed by the testatrix. The court thereupon rejected the proof, upon the ground that the title to the stock in question did not pass by a verbal gift, or handing over of the certificates of stock without a writing. To this ruling the defendant excepted. The judge directed the jury to find a verdict for the plaintiff, and the defendant excepted.

After judgment entered upon the verdict, the defendant appealed to the general term.

Richard O'Gorman, for the appellant. I. The exceptions are well taken. 1. The facts offered to be proved are sufficient to establish a *donatio causa mortis*. It is now established, by frequent adjudications, that *choses* in action, such as bonds and mortgages, and promissory notes, not indorsed, may be well transferred by delivery only, as a *donatio causa mortis*. (*Duffield* v. *Ellis*, 1 *Bligh, N. S.* 497, 542. *Brown* v. *Brown*, 18 *Conn. Rep.* 410. *Hurst* v. *Beach*, 5 *Madd. Ch. Rep.* 497. *Duffield* v. *Hicks*, 1 *Dow, N. S.* 1. *Walter* v. *Hodge*, 2 *Swanst.* 101, *note*. *Runyan* v. *Mersereau*, 11 *John.* 534.) A bond is the subject of gift by the mere delivery of the instrument. (*Blount* v. *Burrow*, 1 *Ves. Jr.* 546.) Also lottery tickets. (*Grangiac* v. *Arden*, 10 *John.* 293.) Also a promissory note of a third person, payable to order of the donor and not indorsed. (*Grover* v. *Grover*, 24 *Pick.* 261. 18 *Conn. Rep.* 410.) In *Penfield* v. *Thayer*, (2 *E. D. Smith's Rep.* 305,) it is held that the gift of a trunk and contents is a valid gift of a pass-book contained therein, constituting the voucher or evidence of deposit in a savings bank; that title to the money is thereby vested in the donee; that, if upon the donor's death the book falls into the hands of his representatives, and the money is collected by them, the donee may recover the same in an action against them. In *Allerton* v. *Lang*, (10 *Bosw.* 362,) it is held that the gift of a cloth pocket, with a pocket-book therein, containing certificates of ownership of bank stock by a deceased person to her step-daughter, three weeks prior to her decease, was a valid gift of the stock; and the court decreed that the executors of the deceased should transfer to the donee the stock in question upon the books of the bank. In the late case of *Westerlo* v. *De Witt*, (36 *N. Y. Rep.* 340,) the Court of Ap-

peals have decided that the delivery of a certificate of deposit of money in a trust company, unindorsed, is a valid *donatio causa mortis* of the money so deposited. The appellant submits that the case last cited is perfectly analogous to the case at bar, and must be conclusive thereof. 2. The fact that no transfer of the stock, and no power of attorney authorizing such transfer, was signed by the testatrix, does not defeat the *donatio causa mortis*. The stock was delivered, and complete possession conferred upon the defendant. The transfer upon the books of the company is required by the company for its purposes, and cannot affect the question of title to the stock, or modify, or determine the rights and relations arising between vendors and vendees, or donors and donees of the shares thereof. (10 *Bosw.* 362, *supra.*) II. The judgment should be reversed.

H. H. Anderson, for the respondent. First, considering the gift, without reference to the subject of the gift, we say: I. If it is sought to hold this a gift, *mortis causa*, the offer and the facts of the case are insufficient to establish such a gift. 1. A gift, *mortis causa*, must be made—(*a.*) In apprehension of death. (*b.*) Must be conditional, to take effect only on the death of the donor of his existing disease or during his existing illness. (*c.*) Be revocable by the donor during life. (*d.*) Be a gift only upon a survivorship. (*e.*) Liable to debts of the donor. (*Harris* v. *Clark*, 2 *Barb.* 94. *Huntington* v. *Gilmore*, 14 *id.* 246. *Bedell* v. *Carll*, 33 *N. Y. Rep.* 581, 584.) This transaction took place a month before the death of the testatrix, and there is nothing in the case, or offer, to show that she made the gift (if made) in any expectation of the near approach of death, or that she died from any disease then existing.

II. The offer is equally insufficient to establish a gift *inter vivos*. 1. A gift, *inter vivos*, becomes complete by de-

livery, is irrevocable, takes effect *in presenti*, and the donor, thereafter, has no more right over the property than any other person. (*Bedell* v. *Carll*, 33 *N. Y. Rep.* 581, 584.) Such a gift establishes an immediate right in the donee to the enjoyment of the property and all its proceeds. The defendant's counsel does not pretend to establish such a gift; for, by the very terms of his offer, the contents of the box (supposing the stocks in question to be part of such contents) were not of use to the defendant until after the death of the testatrix.

III. By the acts stated in the offer made by the defendant's counsel, with the concession annexed thereto, the defendant did not become the owner of the stocks, whether he claimed them as *donatio inter vivos*, or *mortis causa*. 1. The donee, whether the gift is *inter vivos* or *causa mortis*, acquires no interest in the property given until actual delivery. Intention on the part of the owner is not enough, but the intention must be consummated, and carried into effect by those acts which the law requires to divest the donor, and invest the donee with the right of property. (*Ward* v. *Turner*, 2 *Vesey*, 431. *Harris* v. *Clark*, 3 *Comst.* 93. *Hunter* v. *Hunter*, 19 *Barb.* 631. 2 *Kent's Com.* 439. 2 *Black. Com.* 441.) 2. The stocks were transferable only by the testatrix or her attorney, upon the surrender of the certificates, and no transfer of the stock was made, nor was any power of attorney authorizing such transfer signed by her. 3. The certificates of stock are not the stock itself, nor does a gift of the certificates, without a transfer or a power of attorney to transfer, give any interest in or title to the stock. The certificate is a mere statement by the company that the person named therein is the owner of the number of shares therein designated. 4. These certificates of stock are not like promissory notes, bonds, or other contracts, which may pass by delivery; they are evidence of interest in the capital stock of the companies

issuing them, and can be transferred only in the manner provided by the corporations themselves. Upon their face they show how, and how only, this may be done, and of this both donor and donee were aware. Not having been so transferred, the defendant acquired no legal title to the stock, and the same did not pass to him as a gift, and he has no right to hold the same. (*N. Y. and N. H. Railroad Co.* v. *Schuyler*, 34 *N. Y. Rep.* 80 *et seq.*)

IV. The judgment below should be affirmed, with costs.

By the Court, PECKHAM, J. Under the decisions of the court, which have been gradually but steadily advancing in that direction, I think the proof offered by the defendant should have been received, and that the justice at the circuit committed an error in its rejection.

He placed his rejection upon the sole ground that the title to the stocks in controversy could not pass without a writing. In principle, I think he was clearly right. But Lord Hardwicke, at an early day, sought to make a distinction as to a bond delivered without writing, which has been repudiated as unsound in principle, but has been steadily followed, and even extended in practice.

I concur in the views expressed by the court in *Brown* v. *Brown*, (18 *Conn. R.* 410,) against both the principle and the policy of sustaining such a gift. But the authorities are the other way. In my judgment, this doctrine is fraught with the greatest dangers. It leads into temptation, from which we all pray to be delivered, and it greatly facilitates frauds. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it.

The case lately decided in the Court of Appeals, of *Westerlo* v. *De Witt*, (36 *N. Y. Rep.* 340,) sustains the doctrine contended for by the appellant. There, a certificate of deposit in a trust company by the testatrix, given *mortis causa*, by handing over the certificate to the donee, with-

out any writing, was held to transfer the money deposited. There are many other cases of a similar character, in our courts.

The judgment must be reversed, and a new trial ordered, with costs to abide the event.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Ingraham* and *Peckham*, Justices.]

In the matter of ALBERT H. HOOK.

The Supreme Court will not review, on certiorari, proceedings taken against an individual as a disorderly person, under the act of April 17, 1860, "in relation to police and courts in the city of New York," (*Laws of* 1860, *p.* 1007,) for threatening to abandon, and abandoning his wife.

Section 4 of that act provides that any appeal from, or amendment to, an order made by a magistrate, in such proceedings, shall "be exclusively for the action of the court of special sessions." And if that court refuses to entertain jurisdiction, in such a case, it may be compelled by mandamus to do so.

CERTIORARI to reverse proceedings taken under the act of April 17, 1860, "in relation to police and courts in the city of New York." (*Laws of* 1860, *p.* 1007.) The relator was brought before a police justice as a disorderly person, on the ground that he had threatened to abandon his wife, Johanna, and had actually abandoned her. He was arrested on this charge, and brought before the magistrate, by whom he was examined. He denied the charge contained in the affidavit of his wife. He was convicted as prescribed by the statute; and he was ordered to pay twenty dollars weekly to the commissioners of public charities and correction of the city of New York. The proceedings and the trial were in conformity with the statute, except that the wife was not examined at the trial.

CARDOZO, J. The statute of 1860 (*Sess. Laws of* 1860, *chap.* 508, *p.* 1007) provides that "any appeal from or amendment to" an order like that before us, shall be "exclusively" to the court of special sessions. (§ 4.) I think, therefore, that we should not review the proceedings. It is no answer to say that the court of sessions will not, for it may be compelled to do so by mandamus; and as no period is limited for an appeal, the relator can bring the matter before the court, to which the statute gives "exclusive" jurisdiction, at any time. He is not, therefore, without remedy.

I think the writ should be dismissed.

SUTHERLAND, J., concurred.

CLERKE, P. J., (dissenting.) It seems to me that where an act speaks of conviction, it imports a trial, and a trial imports the examination of the accused, or some other witness, at the trial, in support of the charge. In this case there was no such examination. The only person examined was the relator, himself, who expressly denied the charge. On the 29th of September, the wife indeed made an affidavit of the abandonment; but she was not examined at the trial. The trial and conviction were on the 2d of October; when, as I have said, no witness was examined in support of the charge.

The relator, in his examination, swore that he was by occupation a machinist; and the magistrate, as I have said, ordered him to pay $20 weekly for the support of his wife. This is, probably, more than he can earn, throughout the year. We could not, perhaps, reverse the conviction on this ground; but I am in favor of reversing it on the ground of the total want of evidence.

Certiorari dismissed.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Sutherland* and *Cardozo*, Justices.]

GASKIN *vs.* ANDERSON.

The act of the legislature, of May 4, 1869, "in relation to the fees of the sheriff of the city and county of New York, and to the fees of referees in sales in partition cases," which provides that all judicial sales in that city, except sales in cases of partition or where the sheriff is a party, shall be made by the sheriff, is plainly a local bill, and therefore, according to section 16, article 3 of the constitution, it can embrace but one subject, and that must be expressed in its title. And as that act does refer to more than one subject, the first section is unconstitutional.

The first section relates to a subject in nowise expressed in the title of the act. It relates, not to fees, but to the manner in which judgments shall be executed. It attempts to regulate and change the practice of the court, and to take away the right to execute its decrees according to its own judgment, which has prevailed ever since the Court of Chancery had an existence.

Such a radical change of the practice cannot be made under pretense of regulating the fees of the sheriff, and under a bill, the title of which affords no notice of any such purpose, but which simply relates to the "fees of the sheriff."

If the court making a judgment of foreclosure and sale had jurisdiction to make it, the question whether any of its provisions are right—including the one directing the premises to be sold by a referee—cannot be raised by a purchaser.

If the parties do not complain, but acquiesce in the provisions of the decree, the purchaser will get a good title, and he cannot be heard to raise any objection, except that which goes to the jurisdiction of the court.

MOTION to compel a purchaser of mortgaged premises on a foreclosure sale to complete his purchase.

The action was brought to foreclose a mortgage on real estate situated in the city of New York. A judgment for the foreclosure of the mortgage, and a sale of the premises, was recovered after the passage of the act of May 4, 1869, "in relation to the fees of the sheriff of the city and county of New York, and to the fees of referees in sales in partition cases," (*Laws of* 1869, *ch.* 569,) which provides that "All sales of real estate hereafter made in the city and county of New York, under the decree or judgment of any court of record, (except sales in cases of partition, and where the sheriff of said city and county is a party,) shall be made by the sheriff of said city and county. By

the said judgment, J. W. Coleman, Esq., was appointed a referee for the purpose of making the sale, instead of directing a sale by the sheriff.

A sale having been made by the referee, the purchaser subsequently refused to take the title, on the ground that the sale was not made by the sheriff, as required by the above mentioned act.

John Henry Hall, for the motion.

Wm. Henry Arnoux and *Geo. F. Demarest*, for the purchaser.

Brown, Hall & Vanderpoel, for tne sheriff.

CARDOZO, J. This is a motion to compel the purchaser to take the title to premises bought by him on sale under a judgment of foreclosure. By the judgment entered on the direction of Justice BARNARD, James W. Coleman, Esq., was appointed referee to sell, and the purchaser objects to the title, upon the ground that under the act of May 4, 1869, (*Laws of* 1869, *vol.* 2, *p.* 1377, *ch.* 569,) such sale could only be made by the sheriff of the city and county of New York.

The plaintiff's counsel replies that the statute relied upon is in that respect unconstitutional. As the sheriff might be interested in the question, his counsel was permitted to appear upon this motion and represent him; but he failed to assign any reason in support of the constitutionality of this provision of the statute. Indeed, after very careful consideration, I think it will be hard to defend the constitutionality of that act, in many particulars, and among others, on the point in question. The statute is plainly a local bill, and therefore, according to section 16 of article 3 of the constitution, it can embrace but one subject, and that must be expressed in its title. That this

act does refer to more than one subject, and is within the provision of the constitution, is clear. (*See Pullman* v. *The Mayor &c.*, 54 *Barb.* 169, *and cases there cited.*)

In the first place, the title of that act embraces two subjects entirely independent of, and distinct from, each other, viz: "Fees of the sheriff of the city and county of New York," and "fees of referees in partition cases." In the next place, the act itself legislates upon these two different and distinct subjects, by sections two and four.

But it is only necessary to consider, at present, the first section of the act, because it is only under that section that there can be any pretense that the title is objectionable. That section relates to a subject in nowise expressed in the title of the act. It relates, not to fees, but to the manner in which judgments shall be executed. In other words, it attempts to regulate and change the practice of the court, and to take away the right to execute its decrees according to its own judgment, which has prevailed ever since the Court of Chancery had its existence. Such a radical change of the practice of the court cannot be made under pretense of regulating the fees of the sheriff, and under a bill the title of which affords no notice that any such purpose was designed, but which simply relates to the "fees of the sheriff." Under such a title, the fees of the sheriff might be increased or diminished, but that is all that its title would suggest. These are some of the reasons which make it perfectly plain that section one of the act in question is unconstitutional.

It is not necessary to say whether section two, which may well apply to such sales as the court may see fit to send to the sheriff, may not stand; nor indeed to express any opinion as to the rest of the act, so far as the sheriff is concerned.

But apart from all this, and without further pursuing the question of the constitutionality of the act, in respect to the point before me, there are other reasons which

make it clear that the motion should be granted. No consequence is declared by the statute to result from a sale being made by a person other than the sheriff.

It is not to be denied that the court making the judgment which was entered in this action, had jurisdiction to make it. That being so, the question whether any of its provisions were right, which of course includes the one directing the premises to be sold by a referee, cannot be raised by a purchaser. The parties might appeal, or might move the court to correct or vary the judgment; but if they do not complain, but acquiesce in the provisions of the decree, the purchaser will get a good title, and he cannot be heard to raise any objection, except that which goes to the jurisdiction of the court. (*Alvord* v. *Beach*, 5 *Abb.* 451. *Holden* v. *Sackett*, 12 *id.* 473.)

In any aspect in which the matter can be viewed, the objection to the title, raised by the purchaser, is unfounded, and the motion should therefore be granted. But as this is the first time that the statute has been judicially construed, I think there should be no costs of the motion.

Motion granted.(*a*)

[New York Special Term, October 4, 1869. *Cardozo*, Justice.]

(*a*) Affirmed by the court at general term, in November, 1869.

MORGAN and others *vs.* SKIDMORE, executor &c.

An action of *tort* can be maintained against a person, or his personal representative, for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment has been recovered against the firm (and of course against him jointly with the others) for the price of the goods sold on credit to the firm, by the plaintiffs, in consequence of such misrepresentations. SUTHERLAND, J., dissented.

The rule that the creditors of a partnership will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied, applies only to cases founded on the relation of debtor and creditor, and cannot interfere with the remedy against any individual, or his estate, as a wrongdoer.

APPEAL from a judgment entered upon the report of a referee.

The complaint alleges that the plaintiffs are bankers in London, using the firm name of J. S. Morgan & Co., and also have transactions through their agents at the city of New York. That Franklin F. Randolph, during his lifetime, was one of the surviving members of the firm of E. R. Goodridge & Co. of New York, and had charge of its affairs, such last mentioned firm having originally consisted of Ezra R. Goodridge, Franklin F. Randolph and Francis Goodridge. That said Randolph, on or about the 11th day of September, 1867, applied to the plaintiffs' agents at New York for bills of exchange for twelve thousand pounds sterling, to be drawn by the plaintiffs through said agents on the plaintiffs in London, and to be issued to said firm of E. R. Goodridge & Co., or its survivors, and the same to be paid for within ten days; that said Randolph, with intent to induce the plaintiffs so to issue such bills on such credit, and to obtain the same, falsely and fraudulently represented and stated to them that said firm of E. R. Goodridge & Co. was perfectly solvent and responsible, and all its affairs were in good condition; that Ezra R. Goodridge, a member thereof, then lately deceased, had left for his family an estate of at least $200,000 above all his liabilities, and that his, said

Randolph's, private fortune, which was liable for the debts of the firm, was amply sufficient to cover all claims which would come against it on account of the firm or himself; and that he was about consummating negotiations which would enable him to place about $250,000 of cash in the business for the purpose of facilitating its liquidation. That the plaintiffs, believing and relying on said representations and statements, and having no notice of the falsity thereof, thereupon, on 11th of September, 1867, issued said exchange and delivered it to said Randolph for twelve thousand pounds sterling, payable in London, seventy-five days after September 9, 1867, for the price or sum of $85,232.09, to be paid by said firm, or its survivors, ten days after such issue, namely, September 21, 1867. That said Randolph received said exchange and indorsed and negotiated it, and the same on presentment at London was paid by the plaintiffs to lawful holders, who were entitled to the payment thereof. That in truth and in fact, at the time of the making of said representations, the firm of E. R. Goodridge & Co. was not solvent or responsible, and its affairs were not in good condition; and said Ezra R. Goodridge had not left for his family an estate of at least $200,000 above liabilities; and said Randolph's private fortune was not sufficient to cover all claims which would come against it, on account of the firm or himself; and he was not about consummating said supposed negotiations. On the contrary, the firm of E. R. Goodridge & Co. then was insolvent and irresponsible, its affairs were in a bad and desperate condition, and said Ezra R. Goodridge had died insolvent, and left no estate for his family; said Randolph was wholly insolvent and irresponsible, and no negotiations existed for any sum of cash to assist in the liquidation of the firm; all which matters said Randolph then well knew, but the same were wholly unknown to the plaintiffs. That said Franklin F. Randolph departed this life on or about the 18th day of

September, 1867, leaving his last will and testament, which has been admitted to probate, proved and recorded before the surrogate of the city and county of New York, and letters testamentary have been issued to the defendant, William L. Skidmore, as sole executor thereof, and he has the execution thereof. That Francis Goodridge, from the death of said Randolph, has been the sole surviving member of said firm of E. R. Goodridge & Co. That the price of said exchange above mentioned has not been paid in whole or in part, and the plaintiffs have exhausted their remedy by judgment and execution against said survivor without collecting the same, or any part thereof, and by means of the premises they had suffered loss and damage to the amount of said $85,232.09 and interest; for which sum, with interest and costs, they demanded judgment against the defendant as such executor.

The answer was a general denial.

The action was referred to a referee, who found the following facts, viz: That at the several times hereinafter mentioned, the plaintiffs were bankers in London, England, and had transactions through their agents in the city of New York. In and during September, 1867, said Franklin F. Randolph was one of the surviving members of the firm of E. R. Goodridge & Co. of New York, and had charge of that firm's affairs. Said firm was composed of Ezra R. Goodridge, (then lately deceased,) said Randolph and Francis Goodridge. About September 11, 1867, said Randolph applied to the plaintiffs, through their agents at New York, for bills of exchange to be drawn by such agents on the plaintiffs at London, for twelve thousand pounds sterling, and to be issued to said firm on a credit of ten days. In order to induce said agents to issue said bills on said credit, said Randolph falsely and fraudulently represented to said agents that the affairs of said firm were in good condition; that said firm was perfectly solvent; that said Ezra R. Goodridge had left at least

$200,000 clear for his family, and that said Randolph's own private fortune was amply sufficient to cover all the claims against it, on account of the firm's liabilities or his own. The plaintiffs by said agents believed and relied upon said representations, and on the faith thereof the plaintiffs, on the 11th September, 1867, drew said bills of exchange on the plaintiffs, the same being three bills, each for four thousand pounds sterling, on London, dated September 9, 1867, and payable seventy-five days after date; and the plaintiffs by said agents issued and delived said bills to said Randolph on said 11th September, 1867, at a credit of ten days upon the price agreed upon, which price amounted on the 21st September, 1867, when it became payable, to $85,220.74 of lawful money of the United States. That said several representations were false. The affairs of said firm were not in good condition; said firm was not solvent. Said Ezra R. Goodridge had not left his family $200,000, nor any like sum; and said Randolph's private fortune was not sufficient to cover the claims against it, on account of the firm's liabilities or his own; and on the contrary, the said firm and each of its partners, and the estate of said Ezra R. Goodridge, then was insolvent, all which said Randolph then well knew. Said bills of exchange were negotiated by Randolph, and the plaintiffs paid them to the holders thereof. No part of said price was ever paid to the plaintiffs, and they had sustained damages by means of said false representations to the sum of $85,220.41, with interest on that sum from September 21, 1867, to the date of the report, being $6959.63, making together $92,179.63. That said Randolph died September 18, 1867, leaving a last will and testament, and the defendant is sole executor thereof. It was proved that a judgment had been recovered by the plaintiffs for the amount of their claim, against the firm of E. R. Goodridge & Co., and that an execution issued upon it had been returned unsatisfied.

The referee also found the following conclusions of law, viz: That said Randolph, by reason of said false representations, was liable to the plaintiffs for damages in an action for fraud and deceit. That the defendant, as executor of said Randolph, was liable for the same, in like manner. That the plaintiffs were entitled to recover said damages in this action, with costs. He therefore reported that the plaintiffs were entitled to judgment against the defendant as executor of the said Franklin F. Randolph, deceased, for the sum of $92,179.63, with the costs of the action.

The defendant appealed from the judgment so entered.

Wm. E. Curtis, for the appellant.

Charles Tracy, for the respondent.

CLERKE, P. J. The question, relative to the giving of costs to the plaintiffs, against the executor, was considered on the appeal from the order denying a new trial. So that the only question left on this appeal is, whether an action of *tort* can be maintained against a person, or his representative, for deceit, in making false representations as to the solvency of a mercantile firm of which he was a member, when a judgment has already been recovered against the firm (and of course against him jointly with the others) for the price of the goods sold on credit to the firm by the plaintiffs in consequence of those misrepresentations?

It is contended by the counsel of the defendants, that to allow the maintenance of this action, under such circumstances, is to ignore the rule that while the partnership estate is primarily liable to the partnership creditors, the individual estate is primarily liable to the individual creditors. This would be a valid objection if, in this action, the plaintiffs sued as creditors of the deceased; for such a claim would be inconsistent with the claim on which their former action was founded. In that, they alleged, in substance, that he was jointly and not severally

liable with the others. Such an allegation would be manifestly at variance with any claim against him, severally, as an individual, for the same debt. But the present action is in no respect, except in amount, identical with the former. The defendant is sought to be made liable for the conduct of the deceased, as a wrongdoer, and not as a debtor. If the deceased had made the alleged false representations in relation to the solvency of another firm—one with which he was in no way connected—he would, of course, be liable; and the value of the goods sold would be the measure of the damages. The remedy, in such a case, would be more efficacious than an ordinary action to recover the amount of the debt; for the plaintiff would be entitled to an order of arrest, and to an execution against the person of the defendant, in case no property could be found, to satisfy the first execution. The fact that the false representations were made in relation to the solvency of a firm of which the defendant was himself a member, cannot change the nature of the offense, or the rights of the injured party. He is equally a wrongdoer; and they equally suffer from the wrong, and are therefore entitled to any advantage which the law allows against a wrongdoer, over and above what the law allows against an ordinary debtor. The rule that the creditors of a partnership will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied, applies only to cases founded on the relation of debtor and creditor, and cannot interfere with the remedy against any individual, or his estate, as a wrongdoer. The judgment should be affirmed, with costs.

CARDOZO, J., concurred.

SUTHERLAND, J., dissented.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Sutherland* and *Cardozo*, Justices.]

EMMA HOFFMAN *vs.* WILLIAM HOFFMAN.

When the question arises, in an action brought in this court, by a wife against her husband, *pro causa* adultery, as to the effect which shall be given here to a decree of divorce obtained in a circuit court of Indiana, by the husband against his wife, *as evidence*, it is exclusively a question as to the jurisdiction of the Indiana court to make the decree.

In determining that question, in the second action, the court has nothing to do with any allegations of fraud in instituting the action in, or procuring the decree of, the Indiana court.

The fact that the defendant in the former action instituted a suit to set aside the decree in that action, for fraud, will not estop her, when plaintiff in the second action, from insisting, on the trial thereof, that the Indiana court never acquired jurisdiction of her person, so as to make a decree of divorce which the courts of this State are bound to regard as conclusive evidence of a decree valid as to her.

The courts of this State will not regard a service or notice of the pendency of an action by publication in an Indiana newspaper, as giving a court of that State jurisdiction of a defendant who was, at the time, a resident of this State.

A decree for divorce should not direct the payment, by the defendant, of arrears of alimony previously ordered by the court. The plaintiff should be left to enforce the payment of such arrears in the ordinary way.

In respect to permanent alimony, the better way is to direct a reference, to ascertain the amount which should be allowed. Yet a decree of divorce will not be reversed on appeal, because it orders the payment of a specified sum, without a reference.

APPEAL from a judgment or decree of divorce *pro causa adultery.*

By the Court, SUTHERLAND, J. The judgment of the supreme court of Indiana, which reversed the judgment of the circuit court in the action of Emma Hoffman against William Hoffman, left the judgment or decree of the circuit court of Indiana in full force; that is, left that decree with all the force that it ever had.

The material question in this case is, as to the effect which should be given here, to the decree of divorce by the circuit court of Indiana, *as evidence.* In other words, should the court below have regarded the record of the

judicial proceedings, including the judgment, in the Indiana divorce suit, instituted by William Hoffman, as conclusive evidence that he had been divorced from the plaintiff in this action, his former wife, when the acts of adultery alleged and, I assume, proved, in this action, took place?

Considering the provision of the constitution of the United States, (*Art.* 4, *sec.* 1,) requiring "full faith and credit to be given, in each State, to the public acts, records and judicial proceedings of every other State," the question is not free from difficulty.

An examination of the cases cited by counsel, and other cases, has satisfied me that the question is exclusively a question as to the jurisdiction of the Indiana court to make the judgment or decree; that the court below, in deciding the effect to be given to the judgment or decree as evidence, in this action, had nothing to do with the allegations of fraud in instituting the action in, or procuring the decree of, the Indiana court. It seems that the defendant in that action, and the plaintiff in this, thought or was advised that the court in Indiana which made the decree was the proper court to set it aside for fraud, for she instituted a suit in that court for that purpose. But the institution of that suit did not, in my opinion, estop the plaintiff in this action from insisting, on the trial of this action, that the Indiana court never acquired jurisdiction of her person, so as to make a decree of divorce which the courts of this State were bound to regard as conclusive evidence of a decree valid as to her.

The court below found, as matters of fact, that the plaintiff in this action was never served with any summons or other process in the action in the Indiana court in which the decree of divorce was made; and that during the pendency of that action, both she and her husband (the plaintiff in that action and defendant in this) were residents of this State. But the record of the proceedings

in that action shows that she was notified of the pendency of the action, by publication in a newspaper in Indiana, according to a law of that State. The inference from the record is, that she was not notified of the pendency of the action in any other way; and there is no evidence that she was. The record also shows that she did not appear in the action in which the decree of divorce was made.

No doubt all the proceedings in the action in the Indiana court were regular; that is, according to the forms of law prescribed by the laws of Indiana; but the question is, whether the courts of this State will regard the service or notice, by publication in the Indiana newspaper, as giving the Indiana court jurisdiction of the person of the defendant, in that action. It has been decided, in *Vischer* v. *Vischer*, (12 *Barb.* 640,) and in *McGiffert* v. *McGiffert*, (31 *id.* 69,) that they will not.

It does not appear from the report of the last mentioned case that there was service by publication, but it is presumed that there was.

In my opinion we cannot reverse the judgment appealed from, so far as it grants or decrees the divorce, without disregarding or overruling the cases last referred to; and therefore I think that part of the judgment appealed from should be affirmed.

But I find nothing in the case to support the judgment appealed from so far as it orders or decrees the payment of arrears of alimony theretofore ordered by the court. The previous order of the court does not appear in the case, nor does it appear to have been produced on the trial; and if it had been, I do not see why the plaintiff should not have been left to enforce the payment of the alimony in arrears, in the ordinary way. I think the judgment should be modified, by striking out this part of it, without prejudice to the plaintiff's right to enforce the payment of the alimony in arrears, if any, in such way as she may be advised.

As to that portion of the judgment decreeing or giving $800 per year as permanent alimony, though perhaps it would have been better for the court to have made a reference to ascertain the amount which should be allowed, yet on this appeal I think we should presume that the court below was sufficiently informed as to the condition and circumstances of the parties to fix the allowance.

The plaintiff should have her costs on this appeal.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Sutherland* and *Geo. G. Barnard*, Justices.]

DEXTER *vs.* NORTON and others.

Upon a sale of specific articles, the title vests in the purchaser. And that being so, it is well settled that the loss, if any, follows, or attaches to, the title.

The vendor becomes simply a bailee, and cannot, where there is no fault on his part, be liable by reason of the destruction of the bailment. CLERKE, P.J., dissented.

THIS action was brought by George Dexter, the buyer, against Norton, Slaughter & Co., the sellers, to recover damages for the non-fulfillment of an executory contract of sale.

The plaintiff alleged, in his complaint, that on the 5th day of October, 1865, the defendants agreed to sell and deliver to the plaintiff a large quantity, viz., 607 bales of cotton, bearing certain marks and numbers specified in the contract, for the price of 49 cents per pound, and 14 bales of other cotton, having certain other marks and numbers specified in the contract, at 43 cents per pound, all to be paid for on delivery. That by custom the purchaser had ten days within which to call for a delivery of the cotton, and that the time agreed upon for the delivery of this cotton was the 17th October, 1865. The defend-

ants proceeded to deliver the cotton, and delivered 460 bales, and failed to deliver the remaining 161 bales. That the cotton was of different qualities and values, and that the 161 bales not delivered were worth $9630 more than the price thereof fixed by the contract, which sum is the amount of damages claimed.

The answer denies the custom set up and relied upon in the complaint, and states what the custom is. The answer further denies, that the 17th day of October was fixed upon, by the agreement of the parties, for the delivery of the cotton. It also denies the demand, and the readiness of the plaintiff to receive and pay for the cotton within the ten days succeeding the agreement of sale, as required by the custom. It asserts, however, that after the expiration of the ten days, namely, on the 16th day of October, the defendants sent to the plaintiff an order upon the storekeeper for the delivery of the cotton, which was accepted, and that in the night of that day the warehouse wherein the cotton was stored, together with the cotton, was destroyed by fire, without the fault of the defendants.

The answer also denies that the plaintiff has sustained any damages by reason of the premises, and the value of the cotton is claimed by way of counter-claim.

On the 5th October, 1865, as appears by the brokers' memorandum, 621 specific bales of cotton, bearing certain marks and numbers, were bought by sample by the plaintiff of the defendants. By the custom prevailing among dealers in cotton in the city of New York, the plaintiff had ten days within which to call for a delivery. This custom, therefore, would have required the plaintiff to call for a delivery on or before the 15th October. They did not call for a delivery until the 16th. On that day they received a delivery order from the defendants. The order of delivery seems, from the testimony, to be this: The purchaser sends an order on the seller for delivery; thereupon the seller sends an order on the warehouse.

If in his own warehouse, he proceeds to put the cotton in order. This process is the same wherever it may be. The seller finds the weighmaster and the menders; the buyer finds the sampler. The seller puts the cotton in order; damaged cotton is picked out; it is examined to see if it agrees with the sample, the bagging made whole, or new bagging supplied, if necessary. It is then weighed. The delivery of the cotton seems to have been commenced on the 16th October, but how much was delivered on that day does not appear. On the night of that day 161 bales were destroyed by fire. Subsequently, and as soon as the insurance companies would allow, between that day and the 25th, all the remainder of the cotton was delivered and received.

The plaintiff proved a demand of the 161 bales, and a refusal, on the ground that such delivery had been rendered impossible, by the destruction of the cotton by fire. Cotton had risen in price since the day of the sale, and the increase of value on the 161 bales amounted to about $9600. It was to recover this that the action was brought.

At the close of the plaintiff's case, the defendants' counsel moved for a dismissal of the complaint on two grounds:

First. That it did not appear that the plaintiff had demanded his cotton within ten days from the sale, and that he had, therefore, lost his right to enforce the contract.

Second. That a fulfillment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject matter of the sale, and they were therefore excused from the obligation to perform their agreement.

The learned judge held, as to the first ground of the motion, that even if the usage were to be interpreted as claimed by the defendants, so as to conclude the buyer, in general, from the privilege of enforcing a demand made after the lapse of the ten days, yet, in this particular case,

that rigor was waived, and the time extended, by the acquiescence of the parties.

As to the second ground, he held the point well taken; and dismissed the complaint, saying that although, for the purposes of the motion, he must assume that the title to the property did not pass, yet that this was "a sale of specific property, of bales of cotton, according to their marks; that the delivery of no other property than the property called for would have satisfied this contract, and that the destruction of the property by fire relieved the party from his obligation to perform the contract;" and that this action, therefore, could not be maintained. The plaintiff excepted to his ruling.

The exceptions were directed to be heard in the first instance at a general term, and judgment in the meantime suspended.

James C. Carter, for the plaintiff. I. As to the first ground upon which the dismissal was moved. The defendants' counsel wholly misinterpreted the effect of the usage proved. It operated simply to suspend, in favor of the buyer, the right of the seller to take steps toward the enforcement of the contract. 1. Aside from the usage, by the true construction of the contract, either party had the right to forthwith tender performance on his part and demand performance on the part of the other. The party upon whom the demand was thus made would be obliged to perform within a reasonable time; and a refusal or failure to so perform would constitute a breach. 2. Either party would certainly have a reasonable, if not an indefinite, time, after the making of the contract, in which to make his tender and demand performance of the other. 3. There is nothing in the usage proved fixing any time for the performance by either party. The right of the seller is simply suspended for ten days, doubtless for the purpose, the sales being for cash, to enable the buyer to provide the

means of payment. After the expiration of the ten days, the rights of the parties stand as they would without the usage. Either can enforce performance against the other within a reasonable time. 4. Upon the interpretation propounded by the defendants, what becomes of the seller's right to enforce performance? He has no such right within the ten days; has he any after the lapse of the ten days? If there be any such right in him after that time, we have the anomaly, unintelligible, inconvenient and mischievous, of a contract of sale which one party only can enforce. And for how long, pray, has the seller the right to keep the buyer upon the tenter-hooks, in continual fear of a demand upon him by the seller, obliged to keep his money ready and subject to the fluctuations of the market, and with no power to put an end to such an embarrassing predicament? 5. On this construction of the rights of the parties the contract is turned into a succession of *options*, and we have the buyer with the right to enforce it for the period of ten days, during which the seller cannot move; and then the seller, with a right to enforce it during an indefinite period, during which the buyer cannot move. 6. The true interpretation is the one already suggested, by which the ten days is treated as a grace allowed to the buyer, which ceases at the expiration of that period, and both parties then stand upon an equal footing, either being at liberty to put an end to the suspense by calling upon the other to perform. And the rights of both would probably expire, if neither exercised his privilege within a reasonable time. (*Jones* v. *Gibbons*, 8 *Exc.* 920. *Benjamin's Sale of Pers. Prop.* 519.) It is manifest that the witnesses all thus understood the matter, and particularly the defendant Norton. The only doubt and confusion arose from the circumstance that none of them ever knew of a case in which the seller had refused to deliver on the ground that the buyer had failed to call for a delivery during the ten days, although such failures were a mat-

ter of frequent occurrence. This circumstance is very natural and probable, in our view, but quite the contrary on the view of the defendants.

II. But, even on the defendants' view, it was entirely competent for the parties, by mutual assent, to *enlarge* the time for performance, and it was clear that they had done so; or, what is enough for the present purpose, evidence was given sufficient to warrant the jury in finding such extension. It was not until the matter fell under the astute scrutiny of legal gentlemen that this point was discovered. The defendants themselves never dreamed of placing their refusal on this ground. Besides, the contract was in part executed. This, of itself, is a complete waiver.

III. To come to the merits. The contract was an executory agreement for the sale of merchandise. Many certain things remained to be done in respect to the merchandise, by the sellers, before delivery. None of these things were done in respect of the 161 bales in question. It follows that, as to those, the title had not passed at the time of the destruction by fire. (*Joyce* v. *Adams*, 8 *N. Y. Rep.* 291. *Rapelye* v. *Mackie*, 6 *Cowen*, 250. *Simmons* v. *Swift*, 5 *B. & C.* 857. *Rugg* v. *Minett*, 11 *East*, 210. *Benjamin's Sale of Pers. Prop.* 221.) It follows, as a corollary from the foregoing, on the maxim *res perit domino*, that the loss occasioned by the fire fell upon the defendants, in whom the title rested. Whether they were still bound to perform their contract to deliver, or respond in damages, is a further question. (*Joyce* v. *Adams, supra, and authorities last above cited; and Gerard* v. *Prouty*, 34 *Barb.* 454.)

IV. We are thus brought to the main question. It is not entirely clear that the contract was to deliver specific chattels, although the bales were designated by marks; for the sale was by sample, and perhaps any cotton conforming to the sample, and bearing the marks, would answer the purpose. But, for the sake of the argument,

let it be conceded that the sale was of specific goods. The case, then, is this: The defendants voluntarily assumed an unconditional obligation to sell and deliver certain specific goods, the title to which did not pass by the contract. This obligation was susceptible of performance at the time it was made. Performance subsequently became impossible, by reason of the occurrence of an accidental fire. The learned judge held this a sufficient excuse for the non-performance. It is respectfully submitted that this was a clear error. 1. It is an established rule that where a man voluntarily takes an obligation upon himself, by contract, which, at the time, was capable of performance, it is no excuse for the non-performance of such obligation to allege and prove that it subsequently, and without his fault, became difficult or impossible for him to perform it. In our jurisprudence there is no dissent from this doctrine. From the multitude of authorities to this effect, the following are selected: *Harmony* v. *Bingham*, (2 *Kern.* 99;) *Tompkins* v. *Dudley*, (25 *N. Y. Rep.* 272;) *Dermott* v. *Jones*, (2 *Wall. U. S.* 1;) *Story on Contracts*, § 975, *and cases cited; Niblo* v. *Binsse*, (44 *Barb.* 54; *S. C.* 1 *Keyes*, 476;) *Notes to Cutter* v. *Powell*, (*Smith's Leading Cases*, *6th Am. ed.*, *p.* 50;) *Cohen* v. *Gaudet*, (3 *F. & F.* 462, *n.;*) *Hadley* v. *Clarke*, (8 *T. R.* 267;) *Atkinson* v. *Ritchie*, (10 *East*, 530;) *Airy* v. *Merrill*, (2 *Curtis' C. C.* 8;) *Hall* v. *Wright*, (1 *Ellis, B. & Ellis*, 746;) *Spence* v. *Chadwick*, (10 *Q. B.* 517;) *Logan* v. *Le Messurier*, (6 *Moore's S. C.* 116.) 2. The reason upon which this doctrine rests is manifest. The high importance of holding the binding force of contracts inviolable in all cases needs no argument or illustration. And why should parties be relieved in any case from burdens which they voluntarily assumed, and might have refused? The doctrine does not extend to cases where the law casts the duty upon the party. 3. Two exceptions to the universal application of the rule above declared are allowed. It is where the performance of the contract has been made unlawful, or

where such performance has been prevented by the act of the other party. 4. Another exception is sometimes stated, namely, where the performance of the contract has been made impossible by the "act of God." But this is both obscure and doubtful. There seems to be an inclination sometimes among jurists to attribute to the Almighty what cannot be distinctly charged upon any one else. It would be better for them to follow the advice which Horace gives to dramatic authors, not to introduce a God upon the stage except in a crisis worthy of such an awful intervention.

> "Nec deus intersit, nisi dignus vindice nodus
> Inciderit." * * * * *

5. But, whatever may be truly embraced under the phrase, "acts of God," it is very certain that an accidental fire is not. What propriety there is in attributing to such a source what in many cases is the felonious work of some enemy alike of God and man, is not manifest. (*Niblo* v. *Binsse, ubi supra.* 2 *Pars. on Mar. Law*, 180, 181.) 6. The case of carriers by land and water is not an exception. The "acts of God" and the public enemy are, by the terms of their undertaking, excepted. 7. The case of bailees is not an exception. Their duty, which the law casts upon them, is only to exercise a certain degree of care. But if they voluntarily undertake to redeliver the thing bailed in safety, impossibility subsequently occurring does not excuse them. 8. A class of peculiar contracts relating to personal services constitutes an apparent, but not a real exception. Such contracts as that of an author who undertakes to write a work, of a painter to paint a picture, or the bond of a father that his son shall serve as an apprentice, contain an implied condition that the author &c. shall live, &c. (*Note to Cutter* v. *Powell*, 2 *Smith's Lead. Cas.*, 6 *Am. ed.* 50.) The ground for introducing such an implication into contracts of this class is, that the continued life of the party rendering the service was mani-

festly in the contemplation of the parties when the contract was made, and that it could not have been intended by them that a claim for damages should arise in case of death, blindness or other incapacity supervening, because of the difficulty, not to say impossibility, of reaching any correct estimate of the damages. 9. Sales of goods "to arrive" are not an exception. Such contracts are conditional upon their face. (*Benjamin's Sale of Personal Property*, 432.) 10. The claim sought to be enforced in this action would not, perhaps, have been sustainable, if the title to the cotton had passed. The defendants would then have stood in the position of bailees, and the maxim, "*res perit domino*," would have governed; and it is the general rule that when there is a bargain for the sale of specific goods, and a day for the delivery is fixed, or nothing said about delivery, the title passes at once, and the risk is afterwards, even before delivery, upon the seller. (*Bayley, J., in Simmons* v. *Swift, supra. Park, B., in Dixon* v. *Yates*, 5 *Ad. & El.* 313, 340.) The rule that where anything remains to be done to the goods by the seller, (as in our case,) the title does not pass, is an exception to the general doctrine. 11. Hence, whenever it is said that if, after a bargain and sale of goods, and before delivery, the goods are destroyed, as by fire, without the fault of the seller, the obligation of the seller is discharged, such a bargain and sale is intended as passes the title. (*Appleby* v. *Myers, Ex. Ch.*, 2 *Law Rep. C. P.* 653. *Taylor* v. *Caldwell*, 2 *B. & S.* 826.) 12. The cases in which the question now discussed has arisen are chiefly of two classes: *First*, where the party who has been unable to perform himself seeks relief, as plaintiff, as where a man sues for the consideration of work partially performed, and he is met with the objection that he has not performed up to the point which entitles him to the consideration; and, *second*, where the promisee brings his action to recover back an advance payment, or to recover damages

for the non-performance by the promisor. But the rule is applied alike in all cases. 13. The Roman law on this subject was different. But the contract of sale under that system was a very different thing from ours. However complete the bargain might be, the title never passed until delivery. The seller of a specific chattel was called *debtor*, and the buyer *creditor certi corporis;* and from the time of the contract the buyer was entitled to all the increase, and subject to all the diminution and risks which might affect the subject of the sale. If the property was lost or destroyed before delivery, without the fault of the seller, the loss fell upon the buyer, who was still obliged to pay the price. (*Pothier, du Contrat de Vente, parte* IV. *Blackburn on the Contract of Sale, chap.* III. *Benjamin's Sale of Personal Property, chap.* VII.)

V. If the question were open to argument, no fair reason could be shown for rescuing the contract of sale, such as the one in question, from the operation of the rule above shown to be so universal and absolute. 1. If it be said that it is absurd to call upon a man to do what is plainly impossible, the answer is, that the rule only requires the performance of the contract, or damages for the non-performance. It simply pronounces the excuse insufficient. 2. To the plea of hardship, the answer is, that the law disdains such a plea as an excuse for the performance of a contract voluntarily entered into. It estimates at a higher rate, and for higher reasons, the sacredness of engagements. But there is no hardship about it. The loss, to the extent of the contract price of the goods, must, it is conceded, fall upon the sellers. The only question is, whether we shall have the benefit of our contract by recovering the difference occasioned by the rise in the market value. 3. The known practice of merchants is universal to insure goods held by them for sale under such circumstances. The sharp objection made to our proving upon the trial that these goods were insured,

and that the defendants collected the insurance, may furnish some intimation of whether the goods in question were insured, and the insurance collected. The amount recoverable from the underwriters in such cases is the full market value at the time of the loss; so that if these goods were insured, the defendants have recovered, and now have in their possession not only the contract price of these goods, but also the very increase in value for which this action was brought. This is the hardship of being obliged to fulfill contracts in this class of cases. 4. The cotton having risen in value to the extent, on 161 bales, of nearly $10,000, if the defendants were insured, if the rule of law be as is claimed by the defendants, they are the gainers by the fire, and the excuse it affords, of nearly $10,000. No better illustration could be furnished of the solid reason of the doctrine that fire is not an "act of God;" such reason being, that it is not the policy of the law to attribute to the Almighty any act which could or might have been occasioned by man. The doctrine claimed by the defendants would constitute a most tempting reward for setting fire to property. (1 *Pars. on Mar. Law*, 181, 183.) 5. Of course there is no way in which we could reach any portion of the moneys received from underwriters. The plaintiff was not entitled to the benefit of that contract. And by the usage in the city of New York, the plaintiff could not, before the delivery of the goods to him, or the passage of the title, have insured them for his own benefit. 6. The circumstance that in the case of inability to perform a contract for the sale of specific merchandise, the damages are capable of so exact an estimate, (being measured by the difference between the contract price and the market value at the maturity of the contract,) and the further circumstance of the perfect efficacy of the contract of insurance to protect the seller from loss, take away all grounds for any implication that there was an

unexpressed condition in the contract that the goods should continue to exist.

VI. The reasoning of the defendants proves altogether too much. Their position is, that the goods having been destroyed by a fire occurring without their fault, the contract has become incapable of performance by circumstances beyond their control, and so they are relieved from their obligation. 1. Of course it would make no difference, should it be proved that the fire was caused by the felonious act of a stranger. 2. And the principle would be precisely the same, if the goods, instead of being destroyed by fire, had been feloniously stolen by a stranger and removed, no one knew where. 3. It is manifest, therefore, that the principle asserted by the defendants has this full extent, that if it has become impossible to perform the contract in consequence of any event, even the act of a third person, which has arisen without the fault of the promisor, he is excused from his obligation and not bound to pay damages.

VII. If the foregoing argument is well founded, the exception should be sustained, the dismissal of the complaint at the trial set aside, and a new trial ordered, with costs to abide the event.

W. W. McFarland, for the defendants. I. There is but one point in the case, and that is whether, where specific goods are bargained for, and they are destroyed by accident before the completion of the sale, an action can be maintained by the purchaser against the seller to recover damages for a non-delivery? No one has ever before supposed that this could be done; there seems to be no precedent for such an action, and this action would seem to be an entirely novel experiment.

The books abound with cases as to the question upon whom the loss shall fall in such a case, whether the purchaser or the buyer. And this question invariably turns

upon another question, which is this: In whom was the title at the time of the destruction of the property? If in the purchaser, he is bound to pay the purchase money, though the subject matter is destroyed. (*Thompson* v. *Gould*, 20 *Pick.* 139. *Hinde* v. *Whitehouse*, 7 *East*, 558. *Rugg* v. *Minett*, 11 *id.* 210.) If in the case at bar, therefore, the defendants would have been able to show that the title to the cotton destroyed by fire had vested in the plaintiff before the fire, they could have maintained an action against him for the purchase money; but as the title had not vested in the defendants, the agreement as to the cotton destroyed was extinguished, and the defendants, the sellers, had to sustain the loss.

The duty of the vendor, pending the execution of a contract of sale, is to exercise reasonable diligence in keeping the property safe and in proper condition for delivery, (for, doubtless, if he caused the property to be destroyed by his own improper conduct, he would not be allowed to take advantage of his own wrong, but a remedy in some form would exist,) and to be ready to deliver it at the time appointed. But, it is to be observed, that there is no suggestion of any fault or delay on the part of the seller, notwithstanding the fact that he might have refused to deliver, on the ground that the cotton was not called for within the time when the order to deliver was received on the 16th; it was not rejected, but accepted and delivery commenced. The loss of part by fire is not claimed to be due to any fault or negligence on the part of the sellers.

II. It is also to be observed, that the sale was of a specific lot of cotton by sample, particularly designated and described by marks and numbers, and not of so many bales or pounds of cotton, generally. The purchaser clearly would not have been bound to receive, nor was the seller bound to deliver, any other cotton.

III. When there is an executory contract for the sale

of specific chattels, and before delivery they are, without fault of the vendor, destroyed, so that delivery becomes impossible, the obligation of the vendor is extinguished. This is a plain and elementary principle, never before controverted, recognized both by the common and civil law, and expressed with great elegance and precision by an eminent civilian, in the following terms: "Of the loss or extinction of the thing. According to the principles established in the *Treatise on Obligations*, (*part* 3, *ch.* 6,) if one sells a specific thing, the obligation to deliver it is an obligation of a thing certain, and will be extinguished if the thing perishes without the fault of the seller, and before he is put in delay to deliver it, for there can be no duty when there is no longer a debt which is due. If any part of the thing remains, the seller will be bound to deliver that part." (*Pothier on Cont. of Sale*, *art.* 4, § 1, *p.* 31. *Pothier on Obligations*, *Evans' ed.*, *p.* 486. *Zagury* v. *Furnell*, 2 *Camp.* 240. *Domat's Civil Law*, *by Strahan*, *p.* 219, *art.* 335; *p.* 220, *art.* 337.)

IV. If the title to the thing has not passed from the vendor to the vendee, as was the case here, the loss falls on the former; but where it has passed, the latter is bound to pay the purchase money. Inasmuch as no title passed in this case, and the seller for that reason could not call upon the purchaser for the purchase money, the inquiry as to whether the cotton was insured, which was objected to and excluded, and which is the subject of an objection, was not pertinent to the issue, and was properly excluded. (*Domat's Civil Law*, *p.* 221, *art.* 339.)

V. It is obvious that the court below did not err in applying these plain and elementary rules to the case at bar, and dismissing the complaint.

CARDOZO, J. I think there can be no doubt that this case was correctly disposed of at the circuit. It was conceded on the argument that the sale was of specific articles,

and that the title vested in the vendee. That being so, it is well settled that the loss follows or attaches to the title. The vendor becomes simply a bailee, and cannot, where there is no fault upon his part, be liable by reason of the destruction of the bailment. (*Curtiss* v. *Prinderville*, 53 *Barb.* 186.)

The judgment should be affirmed.

GEO. G. BARNARD, J., concurred.

CLERKE, P. J., (dissenting.) It was conceded, I think, at the trial, that the title to the destroyed cotton had not passed to the purchaser (the plaintiff.) At all events, it appears to me clear, from the evidence, that it did not pass to him. The mere transference of the order for delivery was not sufficient; other acts remained to be done, which were essential to perfect the title. After the order was given, the vendors had to proceed to put the cotton in suitable condition, by picking off the damaged portion of it, if any, sewing up and mending the bagging and ropes, and supplying new, if necessary, and putting it in proper condition, generally, for actual delivery. They had also, in the presence of the sampler furnished by the vendee, to compare the bulk with the samples, by which it was purchased, and pass it, if found to conform to the sample. Then it was necessary to pass it to the scales, to be weighed by the owner's weigher, and then to send the bill, with the weigher's return, to the vendee. Indeed, the judge at the trial expressly held that the title to the destroyed cotton had not passed, "because there remained other acts to be done, which were essential to perfect the title."

The judge dismissed the complaint solely on the ground "that the sale was of specific property, of bales of cotton according to their marks; that the delivery of no other property than that called for would have satisfied the con-

tract, and that the destruction of the property by fire relieved the party from his obligation to perform the contract."

This, in my opinion, is entirely at variance with the whole current of common law authority upon this subject. As I took occasion to say, in *Niblo* v. *Binsse*, (44 *Barb.* 54,) "From the earliest period of our legal history, no excuse for non-performance has been recognized, except where the performance has been rendered impossible by the act of God, by the act of the law, or by the act of the other party; or, in the language of Coke, (*Coke Litt.* 206,) 'in all cases where a condition is possible at the time of making it, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there the obligation is saved.'" But accidental fire is not deemed, in legal acceptation, the act of God. This was distinctly held in *Tompkins* v. *Dudley*, (25 *N. Y. Rep.* 272,) by the Court of Appeals; and in *Niblo* v. *Binsse*, the case to which I have referred, the same principle was recognized, although the judgment of the general term was reversed on another point. (1 *Keyes*, 476.) The distinction is well expressed by LAWRENCE, J., in *Hadley* v. *Clarke*, (8 *T. R.* 267,) "Where the *law* creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; but when the party, *by his own contract*, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." In *Harmony* v. *Bingham*, (2 *Kern.* 108,) the Court of Appeals, after quoting the authorities in support of this principle, adds that "this principle has been uniformly followed, and that, too, even in cases in which its application has been considered by the court as attended with great hardness."

This principle applies to contracts of sale, in which the

property is specially designated, as well as to those in which it is not designated; although the civil differs from the common law, in this respect.

The dismissal of the complaint should be set aside and a new trial ordered; costs to abide the event.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Geo. G. Barnard* and *Cardozo*, Justices.]

THE CLEVELAND FIRE ALARM TELEGRAPH COMPANY *vs.* THE BOARD OF METROPOLITAN FIRE COMMISSIONERS.

Where a statute declares that contracts shall be given to the "lowest bidder," these words are not to be construed literally, and accepted as an absolute restriction. Although, in such a case, the bids should, doubtless, be *bona fide*, and conform strictly to the required specifications, yet in determining whether a bid is the lowest among several others, the quality and utility of the thing offered—its adaptability to the purpose for which it is required—must be first considered.

The act of the legislature of April 17, 1861, "relative to contracts by the mayor, aldermen and commonalty of the city of New York," (*Laws of* 1861, *ch.* 308,) requiring all such contracts to be awarded to the lowest bidder, does not apply to contracts made by the Board of Commissioners of the Metropolitan Fire Department; that department being, by the act of March 30, 1865, "to create a Metropolitan fire district," &c., (*Laws of* 1865, *ch.* 249,) invested with sole and exclusive authority to extinguish fires, and to provide all the instrumentalities essential for that purpose, and thus necessarily invested with unlimited discretion in negotiating and executing contracts, without being obliged even to advertise for proposals.

And such board of commissioners having advertised for proposals for a contract for furnishing a fire alarm telegraph, in the city of New York, and the plaintiffs having offered to establish one upon their plan, for $275,000, and other persons having offered to furnish one upon a different plan, for $426,450; *Held* that the commissioners had a right, in the exercise of their discretion and judgment, to adopt the latter system instead of the former, as cheapest in the end; especially as, in their advertisement, they had reserved

the right to reject any or all proposals which, in their judgment, did not embrace a perfect and reliable system.

Accordingly *held* that an injunction could not be sustained, by the plaintiffs, although the lowest bidders, to restrain the execution of a contract made with the highest bidders.

ACTION to restrain the execution and performance of a contract about to be made by the defendants, the Board of Metropolitan Fire Commissioners of the Metropolitan Fire Department, with the defendants Charles T. Chester and John N. Chester for the supply, by the latter, of a fire alarm telegraph apparatus to the city of New York for the sum of $426,450, although the plaintiffs had offered to supply such apparatus for $275,000.

On the 12th of July, 1869, the fire commissioners advertised for proposals for "a new and perfected system of telegraph for fire alarm purposes in the city of New York." The notice specified the nature of the machinery, required the machinery &c. to be of the best quality and improved style, and stated that the commissioners would "reserve the right to reject any or all proposals which, in their judgment," did "not embrace a perfect and reliable system." It also stated that specifications could be obtained at the office. Accordingly application was made for their further specifications. Upon examining them it was found that they described a patented system which Gamewell & Co. held, and which no one else had a right to use. The plaintiffs thereupon sent to the commissioners a protest against this mode of excluding all competition. The time for receiving proposals, by the original advertisement, was limited to July 26, 1869. The commissioners, in reply to the plaintiffs' request and objections, stated that they would receive, and the plaintiffs might put in, proposals based upon the advertisement alone, without reference to the specifications, and extended the time to put in proposals to August 9. The plaintiffs then put in proposals to do and furnish what the advertisement required, for $275,000.

On the 11th of August, 1869, the commissioners awarded the contract to the Chesters, for $426.450.

The plaintiffs alleged that their system had received the approval of the commissioners, or a committee appointed by them, and that the system of Gamewell & Co. and the Chesters was condemned by said commissioners, for its cost; that the defendants, the Chesters, were mere representatives of Gamewell & Co.; and that there was reason to suspect collusion and fraud in giving the job to Gamewell & Co. They invited a public test or examination of the two systems, and claimed that according to the law controlling the action of these officers, they were entitled to the contract for erecting the telegraph.

The plaintiff relied upon the following provision of the act of the legislature of 1861, "relative to contracts made by the mayor, aldermen and commonalty of the city of New York," as showing that the commissioners were bound to award the contract to the lowest bidder, viz: "All contracts by or on behalf of the mayor, aldermen and commonalty of the city of New York shall be awarded to the lowest bidder for the same, respectively, with adequate security; and every such contract shall be deemed confirmed in and to such lowest bidder, at the time of the opening of the bids, estimates or proposals therefor; and such contract shall be forthwith duly executed in the name of said mayor, aldermen and commonalty, by the head of the department having cognizance thereof, with such lowest bidder." (*Laws of* 1861, *p.* 702, *ch.* 308.)

The provision of the fire department act, under which the commissioners acted in making these contracts, is as follows: "The board of commissioners shall have full power to provide, in and for the city of New York, supplies, horses, tools, implements and apparatus of any and all kinds, (to be used in the extinguishing of fires,) and fire telegraphs; to provide suitable locations for the same; and

to buy, sell, construct and repair, and have the care of the same; and take any and all such action in the premises as may be reasonably necessary and proper." (*Laws of* 1865, *p.* 397, *ch.* 249, § 6.)

This was a motion by the plaintiffs for an injunction to restrain the defendants, the Commissioners of the Metropolitan Fire Department, from executing and performing the contract so made with the defendants the Chesters.

James Emott, and *Daly, Henry & Olin*, for the plaintiffs.

—— ——, for the defendants.

CLERKE, J. Only two questions are really presented on this motion: 1. Does the charter, or the act relative to contracts by the mayor, aldermen and commonalty of the city of New York, passed April 17, 1861, control the Board of Metropolitan Fire Commissioners; and if it does, 2. Are the words "lowest bidder" to be construed literally, and to be accepted in an absolute sense.

First. The title of the act, in terms, declares it to apply to contracts made by the mayor, aldermen and commonalty of the city of New York, and so does the text of the act itself. It declares expressly, also, that the contracts referred to in it shall be executed in the name of the mayor, aldermen and commonalty. When we consider that the act of 1865 invests the Metropolitan Fire Department with the sole and exclusive authority to extinguish fires, and to provide all the instrumentalities essential for this purpose, it would be indulging in a very wide latitude of interpretation to say that the restrictions of the act of 1861, or of the charter, apply to it. The truth is, the department are necessarily invested with unlimited discretion in negotiating and executing contracts, and are not even obliged to advertise for proposals. The act of 1865 creates

a fire district, consisting of the cities of New York and Brooklyn, not responsible to, and not identical with, any local authority. The officers and agents of the department are appointed by the Governor with the consent of the senate; they are required to report to the Governor; and although the funds necessary for the support and other expenditures of the department, are levied and collected by the board of supervisors of the county of New York, those funds are deposited and kept in the State treasury.

Second. Even where a statute declares that contracts shall be given to the "lowest bidder," it cannot be held that these words should be construed literally, and accepted as an absolute restriction. In such case, undoubtedly, the bids should be *bona fide*, and should conform strictly to the prescribed specifications; but in determining whether a bid is the lowest among several others, the quality and utility of the thing offered—in other words, its adaptability to the purpose for which it is required—must be first considered. The offer, in nominal amount, may be exceedingly low, while the thing offered may be exceedingly worthless. It may be apparently cheap, while really dear, and much dearer and less adapted to the required purpose than other offers, in which a much larger amount of money was required. If the commissioners were restricted to the lowest bid, they would be bound to consider which of the telegraphic systems submitted to their consideration would ultimately cost the city the smallest amount of money, and which would be the most effectual and most desirable. In the exercise of their judgment in this matter, they have decided that the system which they have adopted is cheaper at $426,450 than that of the plaintiffs at $275,000. In fact they are sustained by the sworn opinion of several experts—among the rest, by that of the renowned inventor of the telegraph. This right of independent judgment they observed in their advertisement;

expressly notifying all, that "they would reserve the right to reject any or all proposals which, in their judgment, do not embrace a perfect and reliable system.

The motion is denied, with costs.

[NEW YORK SPECIAL TERM, at Chambers, October 4, 1869. *Clerke*, Justice.]

BUTLER, assignee &c., *vs.* TRUSLOW.

A judgment entered upon the report of a referee will be reversed when it is entirely and clearly against the evidence.

Prior to May 9, 1859, L., who was engaged in the business of manufacturing sewing machines, had been in the habit of purchasing of the plaintiff materials for such business. On that day the defendant was employed by L. to act as his agent in said business. But he was never a partner of L., and never held himself out to the plaintiff as such partner; and although the plaintiff was informed by a third person that the defendant had become a partner "in the concern," yet he continued to deal with L. precisely as before, charging the goods to him in his books, making out the bills to him, and receipting them to him; and there was no pretense of charging anything to the defendant, or of claiming anything from him, until the solvency of L. became doubtful, when an alteration was made in the plaintiff's books, amounting to a moral forgery; *Held* that the defendant could not be made liable for the goods so furnished to L., it being clear, as a question upon the statute of frauds, that the entire credit was not given to the defendant.

Proof that a witness had previously told to others the same story he testifies to, is inadmissible for the purpose of corroborating his testimony. Hence the testimony of the plaintiff, showing that facts sworn to by a witness were previously communicated to him by the latter, can scarcely be regarded as any legal evidence to confirm the witness.

Where a referee stated, in his report, that there were many circumstances tending to weaken and disparage the testimony of a witness, yet that in view of all the circumstances he felt impelled to believe him *in a specified particular; Held* that this was a proper case for the application of the maxim, *Falsus in uno, falsus in omnibus.*

Where the testimony of a witness was improbable, and inconsistent with the surrounding facts; was contradicted by the defendant, and by the circumstances; the witness contradicted and impeached himself, by his writings and

acts; all the defendant's witnesses contradicted him; the conduct of the plaintiff contradicted him; and he was sustained by no witness and by no circumstance; *Held* that it would be a mockery of justice to sustain a judgment founded upon his testimony.

THIS was an action for goods sold and delivered to the defendant by the plaintiff's assignor. Denial by the defendant's answer. The cause was referred to a referee, who reported in favor of the plaintiff. From the judgment thereon, the defendant appealed to this court.

J. H. H. Pinckney, for the plaintiff.

L. R. Marsh, for the defendant.

By the Court, PECKHAM, J. After a careful and repeated reading and consideration of the testimony in this case, I can come to but one conclusion, and that is that the report is entirely erroneous, and that the judgment should be reversed as clearly and entirely against the evidence.

It appears by the testimony that prior to May 9, 1859, one Lester had been engaged in business in New York, in the manufacture of sewing machines. He had dealt considerably with the plaintiff in purchasing materials therefor. On that date the defendant entered into a contract with Lester, to act as his agent in said business, and to go into his employment. So the referee properly finds. He also properly finds that the defendant was never a partner of Lester, and never held himself out as such partner, to the plaintiff. But he finds, as appears by his opinion, that the goods were purchased under a contract made with the defendant's authorized agent, *or* upon his sole credit; that "the goods were sold on a contract made with William Wetmore as agent for the defendant, and on the sole credit of Truslow, pledged by his said agent, the plaintiff having theretofore refused to sell Lester on credit."

The whole of this finding rests upon the testimony of

this William Wetmore; neither the plaintiff nor any one in his employ ever having seen the defendant, or had anything to do with him personally, as to this business.

I may remark that upon the evidence of the plaintiff and of William Wetmore, if believed, it appears that the plaintiff was informed by Wetmore that the defendant had become a partner "in the concern;" that "a man of means had come into the concern." Yet he never was, and never pretended to be, a partner. And from that time (June, 1859) forward, the plaintiff dealt with Lester precisely as before—charged the goods in day-book and ledger as before—made out the bills to Lester and receipted them to him.

As to trusting Lester, the practice was the same as before. The plaintiff says he never trusted him. The witness Wetmore says he never asked any one to trust him. There is substantially no trust here. The pay was every two weeks. There was no pretense of charging anything to the defendant, or of claiming anything from him, until the necessity of doing so appeared, by the bad prospect of getting the demand from Lester, the real party purchasing. Then an alteration was made in the plaintiff's books amounting to a moral forgery, this action was brought, and Wetmore is the chief, the necessary witness to sustain it. It is entirely clear, as a question upon the statute of frauds, that the entire credit was not given to the defendant. The bills were made out to Lester, and the amount first sought to be obtained from him, for purchases all through the year 1859; and it is not pretended that any new or different arrangement was made as to the year 1860. And the referee finds, as the fact is, that the defendant was not a principal, and did not buy of the plaintiff as principal. If anything, according to the referee, he was simply a guarantor; and the case shows that the whole credit was not given to him. That is an answer to this action.

But it is not at all necessary to put this decision upon that ground. It is impossible to read over the evidence of this witness Wetmore, in connection with the other indisputable facts of the case, without feeling indignant at its utter lack of truthfulness. If we look at the oral testimony of this witness alone, he proves that this defendant was not only a principal in that sewing machine manufacture, but the only principal; that he knew no other; that the defendant was the sole man in the business. Yet he is not only overwhelmingly contradicted by the witnesses and papers in the case, upon every material point, but his own letters, drafts and papers contradict him. They show that he well knew that the defendant was the agent, and that Lester was the principal; that he so treated them. A more absolute impeachment of a witness by himself—a more entire destruction of his credibility—I think I have never seen. The whole substance of his evidence is shown to be untrue, by the writings and acts of the witness himself.

It is said that the testimony of the plaintiff sustains Wetmore. The plaintiff never saw or spoke to the defendant as to the alleged directions he gave to Wetmore. He only testifies to what Wetmore told him, viz., that "a man of means had come into the concern," and that he would pay every other Tuesday. This statement of the plaintiff as to what Wetmore told him can scarcely be regarded as any legal evidence to confirm Wetmore. It is admitted solely to show that the plaintiff gave the credit or sold to the defendant. Proof that Wetmore had told the same story to any other person would have been inadmissible. Yet it would have been just as strong to confirm Wetmore. But the conduct of the plaintiff is at war with this statement as to the defendant; for he continues the charges the same as before, and makes out the bills given, including many items of the bill in suit, against Lester alone, and demands their payment of him, on the

bills; thus in the strongest way sustaining the defendant. But in the spring of 1860 Lester closes up the business, dismisses the defendant as agent, and Lester being not responsible, and the defendant regarded as good, he is sought to be converted from agent to principal, and required to pay for his principal's goods; and he is sued, not as guarantor, but as the vendee of the goods. After saying that Truslow denies the statement of Wetmore, as he unqualifiedly does, (and there is no circumstance in the case to weaken his evidence,) the referee adds that "there are many circumstances tending to weaken and disparage the testimony of Wetmore, yet in view of all the circumstances I feel impelled to believe him *in this particular*."

I have been unable to find the circumstance that aids or sustains Wetmore. The referee seems to concede that he does not credit Wetmore in anything else. *Falsus in uno, falsus in omnibus*, is a sound rule, and this is a proper case for its application.

This testimony of Wetmore as to the alleged authority of the defendant to him to buy, and he, the defendant, would pay every second Tuesday, is improbable, and inconsistent with the surrounding facts. It is contradicted by the defendant, and by the circumstances; the witness contradicts and impeaches himself, by his writings and acts; all the defendant's witnesses contradict him; the conduct of the plaintiff contradicts him. He is sustained by no witness, and by no circumstance. What a mockery of justice to found a judgment upon his evidence!

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

CLERKE, P. J. I concur, on the ground that the finding of the referee is palpably against the weight of evidence.

New trial granted.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Ingraham* and *Peckham*, Justices.]

THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY *vs.* THE MAYOR &c. OF THE CITY OF NEW YORK and others.

The provision contained in the 4th section of the act of the legislature chartering the plaintiff's company, which prohibits the mayor, common council &c. of the city of New York from doing "any other act to hinder, delay or obstruct the operation" of the railroad authorized by said act to be constructed, (*Laws of* 1860, *ch.* 512,) is to be so construed as to prohibit the city corporation from obstructing the operation of the railroad by any act, the sole purpose of which is thus to obstruct it; but not so as to prevent the city corporation from completing a general plan for the sewerage of the city, and from constructing sewers in accordance with such plan. CARDOZO, J., dissented.

When the legislature, in 1865, passed an act authorizing the city corporation to adopt a general plan for the sewerage of the city, and to construct sewers in accordance therewith, (*Laws of* 1865, *ch.* 381,) it may be safely inferred that they intended to withdraw any obstacles to the work which any prior law permitted. *Lex posterior derogat priori.*

Even though the necessary work of completing such plan of sewerage should temporarily suspend the running of the plaintiff's rail cars, the prohibitory language of the act of 1860 ought not to prevent the city corporation from constructing a sewer; upon the principle that "The law would rather tolerate a private loss than a public evil."

THIS is an appeal from an order denying the defendants' motion to dissolve an injunction. The motion was, upon the complaint, answer and affidavits, to dissolve an injunction granted herein, on the 19th day of June, 1869, restraining the defendants from proceeding with the construction of certain sewers in the city of New York.

The plaintiffs allege that they are engaged in the operation of a railroad in certain streets of the city, under several legislative grants, and that among other streets in which they are so operating such railroad are Grand and Clinton streets, and avenue B. The complaint also charges that the defendants, by their Croton Aqueduct Board, threaten and are about to construct sewers in certain por-

tions of said streets occupied by the plaintiffs, and that such construction of the sewers will interfere with the operation of the plaintiffs' road, and work the plaintiffs irreparable injury.

The answer denies all the material allegations of the complaint, except the allegations as to the construction of the sewers, and charges that said sewers were ordered by the Croton Aqueduct Board, in pursuance of the authority conferred by, and in accordance with the requirements of chapter 381 of the laws of 1865. Twenty days' notice was given to the plaintiffs of the intention to construct the sewers, and they were requested to remove their tracks on either side of the street, so as to afford the contractor facilities for excavating the trench of the sewer.

Richard O'Gorman and *W. C. Trull*, for the appellants. I. The motion to dissolve the injunction should have been granted. Until the passage of the act of 1865, the power of constructing sewers in the city of New York was possessed and exercised by the mayor, aldermen and commonalty of the city of New York. (*Valentine's Laws, page* 1190, § 175.) The power thus conferred upon the corporation was absolute. By the act of 1865 the Croton Aqueduct Board was authorized to devise a plan of sewerage for the entire city, and to construct the sewers in accordance with the plans so devised. (*Laws of* 1865, *ch.* 381, *p.* 717.) A reference to the provisions of this act of 1865 will disclose that it was the intention of the legislature to provide a complete system of sewerage and drainage for the entire city. It was under and in pursuance of the powers conferred by this act that the Croton Aqueduct Board commenced and continued the construction of the sewers in question. The plaintiffs contend that this work thus authorized by statute, and actually commenced, should be enjoined, for the reason that the con-

struction of the sewers will obstruct the operation of their railroad, in violation of the prohibition contained in the act of 1860. The act of 1860 provides: "The mayor, common council, and the several officers of the corporation of the said city of New York, and the said corporation are hereby prohibited * * * from doing any other act to hinder, delay or obstruct the operation of said railroad, as herein authorized." (*Laws of* 1860, *ch.* 512, *p.* 1041, § 4.) This claim of the plaintiffs cannot and ought not to be sustained. 1. The grant to the plaintiffs simply authorizes the plaintiffs to construct and operate their road in the streets named. It does not specify any particular portion of the streets upon which the road shall be so constructed and operated. The plaintiffs are therefore free to remove their tracks to any portion of the streets included within their grant, whenever necessity or the interests of the public shall require such removal. It appears by the answer of the defendants, and the affidavit of the engineer Weston, and is not denied, that it is entirely practicable for the defendants to continue the operation of the road at the points where the sewers are being constructed, during such construction, by simply removing their tracks from the center to either side of the streets at those points. Upon the merits, therefore, independent of the legal question involved, the defendants are not entitled to this injunction. 2. The true construction of the prohibition contained in the fourth section of the act of 1860 is, that it prohibits the defendants from making any factious opposition to the construction of the plaintiffs' road, and from obstructing its operation by any act of theirs, the sole purpose of which was thus to obstruct it, and not that the prohibition was intended to prevent the defendants from initiating and carrying out great public improvements, intended for the relief of the necessities and the protection of the health of the citizens. The construction of sewers in the city of New York is required

alike by the health and convenience of the citizens. The sewers of the city of New York furnish the means by which the refuse and garbage of the streets and houses are carried from the city. They are the great protection from disease and pestilence. The legislature, therefore, wisely provided for a general and systematic plan for their construction. It was in pursuance of the plan thus provided that the sewers in question were being built, and the claim of the plaintiffs that they can interfere, at the risk of the public convenience and the public health, and prevent the construction of sewers whenever such construction temporarily inconveniences them, is at once bold and impudent. No reasonable interpretation of the prohibition contained in the act of 1860 will sustain such claim. It never was intended by that provision to deprive the defendants of the power of constructing sewers, and carrying out other public and necessary improvements. The provision was only intended to protect the plaintiffs from direct and positive interference by the defendants or their officers; an interference having for its sole object the obstruction of the operation of the plaintiffs' road, an interference which, as in this case, is only consequential upon the exercise by the defendants of their power to institute and carry out great and necessary public improvements, is not within either the spirit or letter of the prohibition. If it is, and the injunction in this case sustained, then there is not a street used by the plaintiffs which can either be paved, sewered or graded. The plaintiffs' road will thus be constituted an insuperable barrier and obstacle to all public improvements which may ever temporarily interfere with the operation of their road, and that, too, without any regard to the health, convenience or necessities of the inhabitants of the city. It is certain that no sewer can be constructed in the streets in question, unless constructed in the manner in which the one whose construction is restrained was about to be built. (*Laws of* 1865, *ch.* 381,

§§ 4, 8.) The plan for this sewer has been devised and completed. The sections of the act above cited declare that it shall be the permanent plan, and that no sewer shall be constructed except in accordance with such plan. (*Id.* §§ 2, 8.) It must be conceded that no citizen of the city could thus interfere, however great the inconvenience he might suffer or the damage he might sustain. (*Radcliffe* v. *The Mayor &c.*, 4 *N. Y. Rep.* 195, *and cases cited by Bronson, J.*, *p.* 204. *Chapman* v. *Albany and Schen. Railroad*, 10 *Barb.* 360. *Williams* v. *N. Y. Central Railroad*, 18 *id.* 222. *Wilson* v. *The Mayor &c.*, 1 *Denio*, 595.) The citizens of the city and the plaintiffs hold and enjoy their property and privileges subject to the exercise of the legitimate powers of the municipal government and the departments thereof. There is probably no public improvement but that, during its prosecution, occasions temporary inconvenience, and, it may be, actual damage and loss to some of the inhabitants of the city; but this circumstance furnishes no right to the person thus suffering to interfere with or prevent the carrying out of the improvements, nor, as has already been shown, where the damage is consequential, even to a claim for damage. In such case the convenience and interest of the citizen must yield to that of the public.

II. Conceding that the construction of the sewers in question would be a violation of the prohibition contained in the act of 1860, still the order below should be reversed. The acts complained of were, at most, a trespass. No principle is better settled than that an injunction will not lie to restrain a trespass. The plaintiffs' papers show that the damages resulting to them is subject to computation and moneyed compensation. Such being the case, those damages could clearly be recovered by action. In such case the complaining party is ever left to his action at law for damages. (*Thompson* v. *Matthews*, 2 *Edw.* 212. *Hudson and Del. Canal Co.* v. *N. Y. and Erie Railroad*, 9 *Paige*,

323. *Williams* v. *N. Y. Central Railroad*, 18 *Barb.* 222. *Ely* v. *City of Rochester*, 26 *id.* 133.)

III. The case fails to show that the defendants are doing or suffering any act to the injury of the plaintiffs. The defendants have no power to construct sewers. In 1865 the power formerly possessed by the defendants was transferred to the Croton Aqueduct Board. (*Laws of* 1865, *supra.*) The effect of this act was to deprive the defendants of all jurisdiction in the construction of sewers. The Croton Aqueduct Board, in exercising the powers conferred by this act, do not act as officers or agents of the defendants. The power and discretion conferred upon that board is absolute, and entirely independent of the defendants' control. In the exercise of the powers conferred on the Croton board, they act as independent public officers, and not as officers of the corporation. The duties they discharge in devising plans and constructing sewers are statutory, and constitute the members of the board public, not corporate, officers. Such being the character and position of the board, with reference to the power conferred by the act of 1865, it is clear that this case is not within the prohibition upon which the plaintiffs rely, as that prohibition is confined to the acts of the "mayor, common council and the several officers of the city of New York." (*Laws of* 1860, *supra.*)

IV. The order appealed from should be reversed, and the injunction dissolved.

Robinson & Scribner, for the respondents. The plaintiffs, owners of the railroad, authorized and granted by chap. 512 of the Laws of 1860, entitled "An act to authorize the construction of a railroad in Avenue D, East Broadway, and other streets and avenues of the city of New York," passed April 17, 1860, seek to restrain the defendants "from hindering, delaying and obstructing the operation of their railroad," as authorized by that act.

I. It is not pretended that the acts complained of will not have the effect to produce this result. Nor that the effect of the acts which the defendants seek to justify is trivial or of no considerable extent, so that the maxim "*De minimis non curat lex*" could apply to them. For an injury to rights in the nature of incorporeal hereditaments, an action may be maintained, "though the injury done amounts only to a farthing." (*Pindar* v. *Wadsworth*, 2 *East*, 154.) And the protection of franchises of this public character, by injunction, from being interfered with, is within the peculiar province of a court of equity. (1 *John. Ch.* 611. 5 *id.* 111. 9 *John.* 539.) The words of the statute (*Laws of* 1860, *ch.* 512, *p.* 1041, § 3) are positive and peremptory. "The mayor, common council, and the several officers of the corporation of the city of New York, and the said corporation are hereby prohibited from * * doing any other act to hinder, delay or obstruct the construction or operation of said railroad, as herein authorized. And it is made the duty of the said mayor, common council and other officers, to do such acts within their respective departments as may be needful to promote the construction and protect the operation of said railroad, as provided in this law. Any act or thing done in violation hereof shall be inoperative and void;" and by section 4, all provisions of law inconsistent with the act were repealed. (*Bridge Proprietors* v. *Hoboken Co.*, 1 *Wall.* 116. *Binghampton Bridge case*, 3 *id.* 51.) The general railroad act (§ 41) also enacts that any person who shall willfully do any act whereby the railroad shall be stopped, obstructed, impaired, weakened, injured or destroyed, "shall be guilty of a misdemeanor, and shall forfeit and pay treble damages." By 2 *R. S.* 696, § 38, where any duty is enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall

be a misdemeanor. And by section 39, where the performance of any act is prohibited by any statute, and no penalty is specially imposed, "the doing such act shall be deemed a misdemeanor," punishable "by imprisonment in a county jail, not exceeding one year; or by fine, not exceeding two hundred and fifty dollars; or by both such fine and imprisonment." The power to construct sewers in the city of New York is vested in one of the departments of the corporation, styled "The Croton Aqueduct Board," by the charter of 1857. (*Sess. Laws of* 1857, *ch.* 446, § 24. *See also Act of* 1849, *ch.* 383.) This board still acts for and on behalf of the corporation. (*Laws of* 1865, *ch.* 285, § 1.)

As to the intention of the legislature in the enactment of the provisions of section 3 of chapter 512 of the Laws of 1860, as evidenced by the terms used, it would seem there was no room for question. (31 *N. Y. Rep.* 289. 45 *Barb.* 283. *Id.* 218.) 1. All previous powers given to the corporation by statute were to this extent modified, abridged and regulated in express terms. 2. All the authority in the law-making power was exercised to prohibit any acts tending "to hinder, delay or obstruct the operation" of this road, and declare them void; and enjoins upon these officers the duty of promoting the construction and operation of this railroad. 3. In the provisions of the act of 1860, the legislature had in consideration the existing powers of the corporation, and make direct and express reference to them. The language used is plain and unambiguous, and leaves no room for doubt that any such interference as would, to any material extent, hinder, delay, or obstruct the operation of this road was interdicted. The power conferred on the corporation and the plaintiffs were both given for public purposes, and in accordance with the judgment and discretion of the legislature. It was for it alone to weigh the amount of public benefit that might result from a distribution or discrimination in

favor of the one or the other. It would be difficult to hold that the running of a railroad carrying forty thousand passengers a day, is not to be regarded as an object of at least equal public necessity and consideration as the building of a sewer.

II. The acts complained of hinder, delay and obstruct "the operation of the railroad." As a fact this cannot be denied. They are not accidental, nor trivial, or unsubstantial. They involve the defendants in the trouble and expense of removing and relaying tracks exceeding three thousand five hundred dollars, and compel them to suspend and discontinue for a long time *one* of their tracks, (where the act of 1860 requires them to lay and use *two*,) and they create various other impediments or obstructions to their operating their road with their usual and ordinary celerity and effectiveness.

III. All this annoyance, interference and entailment of trouble, loss and expense, the defendants propose, arbitrarily and dictatorially, to impose upon the plaintiffs, as matter of right, and to adopt a plan of sewers, which renders it impossible not to hinder and interrupt the use of the said railroad track. Holding themselves superior to the law prohibiting such acts, they seek to justify them under some alleged necessity arising out of their statutory powers, and to their due and proper exercise, which necessity they have themselves created. It is sufficient answer to this claim to say, all such claims to create such a necessity might possibly be maintained, had the grant of the plaintiffs' franchise been made subject to existing laws conferring such powers; but in this grant the legislature deemed it necessary to protect and give superior protection to the railroad, and to repeal all acts authorizing any such interference, and expressly prohibited the same.

IV. The motion to dissolve this injunction could only prevail, if the case showed the acts enjoined against did not "hinder, delay or obstruct the operation of the plain-

tiffs' road." As matter of fact, the contrary appears by the answer to be a necessary consequence of the defendants' acts. 1. If deemed to be in any respect denied by the answer, it is a controverted fact which ought to abide the trial. 2. The affirmative is positively sworn to by the complaint and the affidavits supporting it. No facts in denial are sworn to by any one cognizant of them. 3. The affidavits of Melendy, C. E., and Nelson Dow, trackmaster, show the allegations in the complaint are true.

V. The order denying the motion to dissolve the injunction should be affirmed, with costs.

By the Court, CLERKE, P. J. The question involved in this motion is, whether a prohibition, contained in an act of the legislature, passed in 1860, shall be so construed as to prevent the defendants from completing a plan for the sewerage of the city, and from constructing the sewers in accordance with this plan. This plan, so exceedingly important to the health and convenience of the citizens, was sanctioned by the legislature, by an act passed in 1865—five years after the act containing the alleged prohibition.

I. The language, to authorize the court to give effect to this alleged prohibition, should be very clear and specific. To compel the municipal government of this city to suspend or abandon its operations in endeavoring to complete a scheme carefully devised for performing one of its most important functions, can be only sanctioned by the express command of the supreme legislative power. The act of 1860 provides that "The mayor, common council and the several officers of the corporation of the said city of New York, and the said corporation, are hereby prohibited &c. from doing any other act to hinder, delay or obstruct the operation of said railroad as herein authorized." Even if the necessary work, in completing this great plan of sewerage for the city, temporarily sus-

pended the running of the plaintiffs' rail cars, this prohibitory language ought not to prevent the defendants from doing so. It is a cherished maxim that "The law would rather tolerate a private loss than a public evil." (*Coke Litt.* 152, *b.*) And, although it would be a public inconvenience to suspend travel even temporarily on the plaintiffs' railroad, it would be trivial, compared with the evil and the danger which would be the consequence of stopping this great sanitary undertaking.

II. I think another maxim of the law may be applied to this case. *Lex posterior derogat priori.* When the legislature, in 1865, passed an act allowing the defendants to construct and complete this plan of sewerage, it may be safely inferred that they intended to withdraw any obstacles to the work which any prior law permitted.

III. But I agree with the defendants' counsel, that the true construction of the prohibition contained in the 4th section of the act of 1860 is, that it prohibits the defendants from obstructing the operation of the plaintiffs' railroad by any act, the sole purpose of which was thus to obstruct it, and not that the prohibition was intended to prevent the defendants from initiating and carrying out great public improvements, intended for the relief of the necessities and the protection of the health of the citizens. Besides, it appears that it is entirely practicable for the plaintiffs to continue the operation of the road at the points where the sewers are in the course of being constructed, by removing the tracks from the center to either side of the streets, at those points. So that, the truth is the plaintiffs are seeking to avoid comparatively trivial trouble and inconvenience by stopping the prosecution of a work which, beyond all question, will be of the highest possible advantage to the inhabitants of this city.

The order should be reversed, with costs, and the injunction dissolved.

CARDOZO, J., (dissenting.) The plain intent of the statute of 1860, creating the plaintiffs, was to protect them not only in the construction of their road, but also in its "operation;" and accordingly it not only prohibits the city from doing any act to hinder, delay or obstruct the construction, but also the operation of the railroad; and it makes it incumbent upon the city authorities to do such acts as may be needful to promote the construction and to *protect* the *operation* of the road.

The convenience of the road for travel was a great public benefit, and the legislature meant to secure its uninterrupted use by the citizens. It is no answer to say that the building of sewers is also beneficial to the public, and necessary to the health of the city, which of course is of paramount importance; because it does not appear but that the sewer may be built without interfering with the plaintiffs at all. That the defendants have seen fit to get from the legislature an act which requires them to make a general plan for sewers in sewerage districts, does not affect the case, for they need not adopt, unless they choose, such a plan as will interfere with the plaintiffs; or if they have done so, they can apply to the legislature for relief so as to enable them to change that plan.

The plaintiffs having exhausted their right to lay their track, cannot lawfully remove it to any other part of the street, and it should not be suggested that they ought to be trespassers and wrongdoers even for a brief period; or that the public should be inconvenienced by having travel on the road suspended, when all that the defendants need do to have both of these desirable public benefits coexist, is to conform the plan of the sewerage district to the necessity of the case.

I think the order should be affirmed.

Order reversed.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Sutherland* and *Cardozo*, Justices.]

HUNTLEY *vs.* DOWS and others.

Consignees of a cargo of grain, who are not themselves the owners thereof, are only liable to the owner of the vessel for an improper detention of the boat at the place of delivery, arising from their own misconduct or neglect.

It is their duty to provide, at the earliest moment practicable, a place of storage; and they have no right to detain the carrier and his boat while endeavoring to effect a sale of the cargo. They are liable for the damages occasioned by such detention.

If the carrier, after the cargo is discharged, settles with the consignees, and gives his receipt "in full for freight and charges," such receipt is not evidence that the claim for damages was settled.

The term "charges" does not apply to such a claim, but refers only to such expenses as the master of the boat has paid, and for which he has a lien upon the cargo.

THIS action was brought against the defendants, who were consignees of a cargo of wheat, laden at Oswego, on board of the canal boat of the plaintiff, and to be delivered to the defendants at the port or city of New York, to recover damages for the detention of the boat after its arrival at New York. The complaint charged that the defendants agreed to pay for any improper detention; and also that the defendants improperly neglected and refused to receive the wheat and unload the boat.

The cause was tried before a referee, who reported in favor of the plaintiff, for three and three-fourths days of unreasonable detention, at $50 per day, making $187.50, with interest thereon, being $33.19, and amounting in all to the sum of $220.69, for which, together with costs, he ordered judgment for the plaintiff. The defendants appealed.

Edwin Allen, for the appellants.

A. Perry, for the respondent.

By the Court, FOSTER, J. There was no contract proved to pay demurrage. And there was no proof of any custom at the port of New York to allow demurrage. And it

appeared that the defendants were not the owners of the grain, it having been consigned to them by an agent of the owner, who had drawn his individual draft upon the dedefendants for $6000, to reimburse himself for advances which he had before made upon the cargo, and that draft on the defendants was drawn against the cargo.

The defendants, therefore, are only liable for an improper detention at New York, arising from their own misconduct or neglect. The boat arrived at New York, and the defendants were notified thereof on the morning of Tuesday the 20th or 21st day of November, 1860, at 8 o'clock. From that time to the afternoon of Thursday following, the plaintiff repeatedly called upon the defendants to discharge the cargo, but instead of attempting to provide a place to unload the boat, they were engaged in trying to effect a private sale of the grain.

On the afternoon of Thursday the defendants gave the plaintiff an order upon a warehouseman to unload the boat, and they commenced unloading it on the following Saturday, in her regular turn, and finished unloading it on Monday afternoon, and the boat was unloaded, after her arrival at the warehouse, as soon as could be.

I think the defendants were liable for such detention as took place while they were endeavoring to effect a sale of the wheat, instead of trying to provide a place to unload it. It was their duty to provide at the earliest moment practicable a place for its storage; and they had no right to detain the plaintiff and his boat while they could effect a sale. The plaintiff, therefore, was entitled to recover for the two and a half days, while thus kept waiting, which, according to the testimony, amounted to $125, and the interest thereon from that date. Beyond that amount the plaintiff was not entitled to recover; because it does not appear that, after the two and a half days, there was any unnecessary delay; and because it does appear that within three working days thereafter the cargo was discharged.

It is claimed by the defendants that the plaintiff, after the wheat was discharged, settled with them and gave his receipt in full for his freight and all charges, which receipt discharged the claim of demurrage. The receipt is as follows: "Received, New York, Nov. 26th, 1860, of Messrs. David Dows & Co., eight hundred and four dollars, in full for freight and charges, on boat J. J. Austin. A. Huntley." It was also proved that the $804, included in the receipt, covered only the amount due for freight and the sum paid by the plaintiff for towage, which, by the terms of the bill of lading, was to be paid by the consignee. I think the receipt was not evidence that the claim for demurrage was settled. The term "charges" does not apply to such a claim, but refers only to such expenses as the master of the boat has paid, and for which he has a lien upon the cargo.

The recovery, therefore, should have been for the two and a half days' detention, as before stated, and the interest thereon. The judgment must be reversed, and a new trial granted, with costs to abide the event, unless the plaintiff shall elect to reduce the damages to the sum of $125, and interest from November 26th, 1860; and, in that event, no costs of this appeal to be allowed to either party.

[ONONDAGA GENERAL TERM, June 28, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

JESSE N. BOLLES, receiver &c., *vs.* JOHN A. DUFF and others.

A motion for a new trial having been put upon the general term calendar, was noticed by both parties for argument, and on the case being called, the plaintiff's counsel appeared, but no one appeared for the defendant. The plaintiff's counsel expressing an unwillingness to take the defendant's default, requested permission to submit the case, with his points, with liberty to the defendant to submit points in support of his motion. The court permitted him to do so, and made an order to that effect, took the case for decision, and directed notice of the order to be given to the defendant, which was given.

Held, 1. That this proceeding could not be properly called taking a *default;* and that the order so made could not be vacated at a subsequent general term held by other justices, while the case still remained before the court, undecided, on the ground that the defendant's *default* had been taken.

2. That the proceedings taken at the first general term, whether called a submission or not, gave the judges then present and holding the term, not only power to make a decision or disposition of the case and motion, binding on the parties, but also made it their duty to decide or dispose of the same, whether the defendant did or did not avail himself of the privilege of submitting points.

3. That if those judges had that power, and such duty was or had been imposed upon them, then the general term which made the subsequent order vacating the first, had no power to make the same; inasmuch as, when it was made, the motion for a new trial had not been decided or disposed of by the justices who had previously taken the papers for the purpose of deciding the motion.

4. That it was the plain duty of the latter justices, notwithstanding the subsequent order, to decide and dispose of the defendant's motion for a new trial.

5. That irrespective of the question of the power of the justices of this court to interfere with the exercise of the official powers, or the performance of the official duties of each other, after the exercise of such powers and the performance of such duties, have attached in a particular case, and before they have been exercised or performed, the order last made should be vacated, on the ground that it must be presumed to have been made under a *misapprehension* of the prior proceeding, and the effect of it in possessing the justices who held the first general term of the case and motion of the defendant, for decision. CARDOZO, J., dissented.

MOTION to vacate orders made at a general term. The material facts are stated in the opinion.

B. C. Thayer, for the plaintiff.

A. Oakey Hall, for the defendant Duff.

SUTHERLAND, J. This is a motion by the plaintiff to vacate and set aside two orders of this court in this action, made at the general term, one dated the 10th, and the other the 14th of June last, by the first of which the court set aside and vacated what in and by the order is called "the default taken by the plaintiff in above action, on the 20th day of April, 1869, at the general term of this court," and, further, ordered the case "to be orally heard," at the then present general term, and that the cause be set down for argument on the second Monday of said June; and by the other of which orders, the court reversed, vacated and set aside the interlocutory judgment or decision of Justice POTTER, made in this action, at special term, on the 29th day of June, 1866, and all proceedings had thereunder, and awarded a new trial to the defendant Duff.

The following facts appear from the papers submitted on this motion:

This is an equity action, and was tried before Justice POTTER, at special term, and an interlocutory decision or decree was made by him therein, on the 29th day of June, 1866, by which the defendant Duff was decided and declared to be a mortgagee and trustee of certain property, in his possession, and liable to account, &c., and by which a reference was made to a referee named, to take and state the account, upon certain principles stated, and by which the question of costs, and all questions, except those settled by the interlocutory decision, were reserved until the coming in of the referee's report. On the 30th of March, 1868, and after the amendment of section 268 of the Code, by the act of April 25th, 1867, allowing and providing for a motion for a new trial at general term, on a case and exceptions, before final judgment, when the interlocutory decision or judgment directed an accounting or further proceeding; and while the accounting was pending before the referee named in the interlocutory decision or judgment, or any other referee

substituted for him, and of course before there had been any report of a referee, or final judgment, the attorneys for the defendant Duff served the attorney for the plaintiff with a copy of a case and exceptions made, taken and filed in the action, with notice that a motion for a new trial would be made thereon, at the ensuing April general term.

The case having been put on the general term calendar, and not having been reached, as must be presumed, the attorneys for the defendant Duff, and the attorney for the plaintiff, both noticed it for argument at the April general term, 1869. At the April general term, 1869, on the 20th day of April, upon the case being called, and the attorney and counsel of the plaintiff appearing and answering, and no one appearing or answering for the defendant Duff, and upon the attorney and counsel for the plaintiff expressing a disinclination to take the defendant's default, and requesting permission to submit the case, with his printed points, with liberty for the defendant Duff to submit points in support of his motion, the court permitted him to do so, and made an order to that effect, stating on its face that it was made on due proof of notice of argument for the first Monday of April, in and by which order it was directed that the defendant's attorneys should have notice of such submission, and permission for the defendant Duff to submit points.

On the 22d day of April, 1869, the defendant Duff, his attorneys, and Mr. John Graham as his counsel, or one of his counsel, were served with written notices, by the attorney for the plaintiff, of such submission, which notices stated that the defendant Duff had liberty to submit points in support of his motion.

The account in the moving papers of what took place at general term, when the case was called on the 20th of April, the order of the general term, and the notice subsequently given to the defendant Duff, his attorneys and

counsel, does not permit a doubt that the court intended that the attorney of the plaintiff should submit, with his points, papers sufficient or requisite for the examination, and decision or disposition of the motion for a new trial on the case and exceptions; and that the attorney for the plaintiff did submit, and hand up to the court, copies, or papers purporting to be copies, of the case and exceptions, with his points; and that the court received such copies of the case &c., with the points, for the purpose of deciding and disposing of the motion. No points were submitted, for or in behalf of the defendant Duff, before the adjournment of the general term for the term, nor was any motion made to the general term, before its adjournment for the term, for or in behalf of the defendant Duff, to be heard orally on the motion; but on the 26th day of April, 1869, after the general term had adjourned for the term, his attorneys in the action applied to a justice of this court, other than either of the justices who held the general term when the order of submission was made, and obtained from him an order, dated on that day, for the plaintiff or his attorney to show cause before him, at special term, at chambers, on the 28th of June, at 10 A. M., "why the *default* taken by the plaintiff herein, on the 20th instant, and referred to in the annexed affidavits, and also in the notice served by the plaintiff's attorney, under date of April 20th, 1869, a copy whereof is hereto annexed, should not be set aside and vacated, and why the case should not be ordered to be heard at the next general term, in the regular course of the calendar," &c.

This order to show cause was obtained on two affidavits; one of Mr. Van Antwerp, as one of the attorneys for the defendant Duff, and the other of Mr. Hall, as counsel or associate counsel for him, which two affidavits were the affidavits referred to in the order to show cause, as annexed to it; and to which affidavits, and referred to there-

in and in the order to show cause, was annexed an alleged copy of a notice, of which the following is a copy:

[Title of cause.]

"Gent: You will please take notice that your motion for a new trial in this cause was this day submitted to the general term on the case and exceptions herein, and my printed points; and that you are at liberty to submit points in support of your motion.

Please furnish me with a copy of your points herein, and I will furnish you with a copy of mine.

Yours, &c., B. C. THAYER,
Plaintiff's Att'y.

To Messrs. Van Antwerp & James,
Att'ys for the defendant Duff.

Dated New York, April 20th, 1869."

In both affidavits the proceeding which took place on the 20th of April, 1869, at general term, when the case was called, no one appearing for the defendant Duff, was called "a default taken," and in both affidavits the alleged copy of a notice annexed, of which a copy is above given, is referred to, as showing that that proceeding was a default taken.

On the return day of the order to show cause, the plaintiff's counsel not appearing, the hearing of the motion was postponed by the justice who granted the order to show cause, until the 6th of May following.

A motion having been made by the plaintiff before another justice, for an order postponing the hearing of the motion by the defendant to set aside the alleged default taken by the plaintiff at the April general term, until the decision by the general term of the defendant Duff's motion for a new trial, in which motion of the plaintiff an order staying proceedings had been granted, Duff's motion to set aside the default alleged to have been taken at the April general term, was directed by the justice who grant-

ed the order to show cause, to proceed before him on the 25th of May, 1869.

The plaintiff's motion to postpone the hearing of Duff's motion until after the decision of the general term, was denied on the 20th of May, 1869, after a hearing, and the stay of proceedings vacated.

On the 25th of May Duff's motion, both parties appearing by counsel, it is said, in an affidavit read on the part of the defendant Duff, was proceeded with, but not concluded. But it does not further appear what was done. On the 27th day of May the counsel of Duff obtained an order from the justice before whom the motion was pending, continuing and adjourning the motion to the 7th day of June (the first day of the next general term) following. By this order either party had liberty to notice the cause for a hearing at the next general term, and place the same on the calendar; but all other proceedings were stayed by the order, until the final decision of Duff's motion so continued and adjourned. On the same day (27th of May) an order was obtained from the same justice, for the plaintiff to show cause, at the opening of the court on the first day of the next general term, (the first Monday and the 7th of June,) "why the default taken by the plaintiff on the 20th day of April last, at the general term of this court, should not be set aside and vacated, and the cause ordered to be heard at the said general term in the regular course of the calendar," &c. Which order to show cause, as appears by a recital on its face, was granted on the affidavits and papers served, used and referred to, on the motion before the said justice, on the order to show cause granted by him on the 26th of April last.

The attorney for the plaintiff was served with the orders of the 27th of May, and also with a notice of a motion to be made at the opening of the court, on the first day of the then next June general term, to set aside the default alleged to have been taken by the plaintiff on the 20th

day of April last, and also with notice of argument of Duff's motion for a new trial at the opening of the general term on that day; which last mentioned notice the attorney for the plaintiff declined to accept, and returned, on the ground that there was no such motion for a new trial then pending; that the same had been submitted for decision, by order of the general term, on the 20th day of April, 1869, of which the attorneys of the defendant Duff had theretofore had due notice.

At the opening of the next June general term, on the 7th of June, Mr. Hall, as counsel for the defendant Duff, made the motion to set aside what was called the default of the defendant Duff, taken on the 20th of April, the attorney for the plaintiff appearing, and reading and leaving with the court, or the clerk of the general term, a copy of the general term order of the 20th of April, an affidavit stating what took place when that order was made, substantially as the circumstances of the transaction or proceeding have been above stated, and a protest in writing against the court entertaining the motion, on various grounds, which it is not necessary specially to refer to.

Subsequently, and on the 10th of June, the motion was decided, and the next day the order dated the 10th of June, and called herein before the order of the 10th of June, was settled and made. Subsequently, and on the 14th of June, the case, or the defendant Duff's motion for a new trial, having been put on the calendar, was called, and no one appearing for the plaintiff, the order of the 14th of June was made.

When this order of the 14th of June was made, the justices who made the order of the 20th of April had not decided or made any disposition of the motion for a new trial on the papers which had been submitted to them, on making that order.

It does not appear that the defendant Duff, his attorneys or counsel, have ever submitted, handed up, or sent, points

on the motion to the justices last referred to, or either of them, or have ever, any or either of them, expressed or intimated an intention or willingness to do so.

The two justices, who with the presiding justice, held the April general term, and made the order of the 20th day of April, were other than the two who, with the presiding justice, had been assigned to hold the June general term, and held it, and made the orders of the 10th and 14th of June.

There are other matters, which I have not specially referred to, in the papers; but I deem the facts which have been stated all that are necessary for stating and understanding the grounds on which I think the general term orders of the 10th and 14th of June should be vacated; which are:

1st. It is impossible to view the motion of the defendant Duff, to vacate and set aside what in the order of the 10th June, and the papers on which it was made, is called a default taken, as recognizing on his part that his case and exceptions and motion for a new trial had been submitted at the previous April general term, so that the justices who held that general term, and had the papers for decision, could decide or make any disposition of the case or motion, *binding on him, Duff.*

There was nothing in his motion papers (nominally and in form to set aside a default taken) which can be said to have been stated by way of excuse for not having availed himself of the privilege granted him, and of which he had notice, to submit points; nothing stated in them to show that he wanted further time to submit points; nothing tending to show that there were circumstances about his case, or questions in it, or features of his motion, making an oral argument necessary or advisable, other than the mere statement that he or his counsel desired an oral argument.

It is palpable that his motion to set aside what was

called a default taken, and the order of the 10th of June, must be received as having been made on the ground that his default had been taken.

2d. His default had not been taken. The papers on this motion show that his default had not been taken. The order of the April general term shows it; the very copy notice annexed to the affidavits upon which the order to show cause was granted, and the order to show cause, and referred to in them, show it.

It is impossible to call the proceeding at general term, on the 20th of April, the taking of a default. Duff's default was not taken. The attorney and counsel of the plaintiff declined taking his default. The court took the case for decision; of which, and of his privilege of submitting points, Duff, his attorneys and one of his counsel, had notice.

3d. I think what took place when the case was called on the 20th of April, at the April general term, whether it be called a submission or not, gave the justices of this court, then present and holding the term, not only power to make a decision or disposition of the case and motion (until regularly reversed or set aside) binding on the plaintiff and the defendant Duff, both, but also made it their duty to decide or dispose of the case and motion, whether the defendant Duff, or his counsel, did or did not avail himself or themselves of the privilege of submitting points.

4th. If these justices had this power, and such duty was or had been imposed upon them, it is, I think, impossible to say that the general term that made the orders of the 10th and 14th of June had power to make them, for the motion for a new trial on the case and exceptions, when these orders were made, had not been decided or disposed of by the three justices who on the 20th of April had taken the papers for the purpose of deciding and disposing of the motion.

The question of power is not a question as to the power of the court as an entity or in the abstract. The question

is not whether a general term of this court, held by Justices C., I. and S., has, or has not, the same or as much power as a general term held by Justices C. and C. and B. Of course two general terms, so held, may be said to have the same or equal power. But the question of power which arises on this motion to vacate the orders of the 10th and 14th of June is, as to the power of the justices, as administrators of the powers and duties of this court, to interfere with the exercise of the official powers or the performance of the official duties of each other, after, and when, the exercise of such powers, and the performance of such duties, have attached in a particular case, and before the powers have been exercised or the duties performed.

Of course there is no limit to the power of thinking. The June general term that made the orders of the 10th and 14th of June, may have deemed the proceeding at the April general term, when the case was submitted, a default, or a default taken. It is plain that the April general term did not deem it a default, or a default taken, and that the defendant Duff's default was not in fact taken.

But the question is not, what either of the general terms *deemed* the proceeding of the 20th April. The question of power is, whether the June general term, under the undisputed circumstances, *by deeming or calling the proceeding of the 20th of April a default, or a default taken*, had power to make the orders of the 10th and 14th of June, with the effect (I do not say design or intention) of relieving the justices who hold the April general term, of the power, and discharging them of the duty, of deciding or disposing of the defendant Duff's motion for a new trial, when it must be presumed it was being held under consideration by them.

I think it the plain duty of the justices who held the general term in April, to whom the papers were submit-

ted, and who made the order of the 20th April, notwithstanding the orders of the 10th and 14th of June, to decide and dispose of the defendant Duff's motion for a new trial on the case and exceptions; and if the order of the 14th of June is permitted to stand, I do not see why there must not be two general term orders in the case, on the same motion for a new trial, inconsistent with each other, whatever may be the decision of the justices who made the order of the 20th April; and I do not see how the plaintiff could be relieved, or saved, from the embarrassments which two such general term orders would cause, otherwise than by this motion, and its decision.

5th. But it is by no means necessary to say that the orders of the 10th and 14th of June were made without *power*. The general term of this court often vacates and modifies its own orders as inadvertently made, or on the ground that the court was misled by a mistake or misapprehension as to, or of, some material fact, or circumstance.

Irrespective of the question of power, I think the orders of the 10th and 14th of June should be vacated, on the ground that we must or should presume them to have been made under a misapprehension of the proceeding, and the effect of the proceeding, on the 20th of April, which possessed the justices who then held the general term, of the case and motion of the defendant Duff, for decision, which misapprehension we must and should further presume arose from the unjustifiable misnomer of the proceeding of the 20th of April, by and in the papers on which the order of the 10th of June was granted. Of course, in vacating the orders on this ground, it is to be presumed that if the same justices who held the general term when the orders were made, had happened to hold the general term when this motion was made, they would have vacated them.

The orders, however, should be vacated, without costs

either to the plaintiff or the defendant Duff, as against each other.

CLERKE, P. J. I differ from SUTHERLAND, J., so far as he denies that the June term had power to make any disposition of the procedure at the April term.

Whether that procedure be called a submission or default, I hold that the general term, sitting in June, were capable of annulling or modifying it at any time before the final decision of the justices who sat at the April term, on the papers then submitted to them.

As I said in my dissenting opinion on the motion at the June term, I considered it exceedingly inexpedient to interfere with the action of the April term; but I did admit that the justices composing the June term had the power to do so.

But the same power which they exercised in relation to the action of the April term, the justices composing the November term possess in relation to the action of the June term; and, as I still consider the former an inexpedient, if not irregular, exercise of power; and as it was plainly a default, caused by the misapprehension or error of the plaintiff's attorney, I think, in so important a matter, that the plaintiff ought to have an opportunity of being heard. I therefore concur with SUTHERLAND, J., in the conclusion at which he has arrived, irrespective of the question of power.

CARDOZO, J. I dissent. I agree with Judge CLERKE that the last general term had the power which it exercised, and no reason exists to vary the discretion which it exercised.

Orders vacated.

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Cardozo* and *Sutherland*, Justices.]

BEATRICE BISSELL *vs.* JOHN BISSELL.

In this State, so far as its validity in law is concerned, marriage is a civil contract, and no religious form or ceremony of any kind is essential to its validity.

All that is requisite is that the parties should be capable of contracting, and that they should actually contract to be man and wife.

A mere agreement to marry at some future time, followed by cohabitation, will not constitute a marriage; but an agreement made in the present tense, whereby the parties assume towards each other the marital relation, is an actual marriage.

This agreement may be written or verbal, with or without witnesses, and may be proved like any other contract. When proved to the satisfaction of a court of justice, it constitutes a lawful marriage.

The wife being, by recent legislation, made a competent witness in actions in which her husband is a party, her testimony, if corroborated and entitled to credit, is sufficient to establish the marriage.

Upon such testimony, the court may, in an action brought for that purpose by the wife against the husband, declare the plaintiff to be the lawful wife of the defendant, and their issue legitimate, and adjudge a limited divorce and alimony on the ground of abandonment, with costs and expenses of the litigation.

A man and woman, being engaged to be married, the former stated to the latter that he did not believe in marriage ceremonies, and wished her to waive the ceremony, saying that a marriage without it would be perfectly valid. She finally consented to waive any ceremony, and fixed a day for the marriage. On that day, while they were riding together in a carriage, he placed a ring upon her finger, saying: "This is your wedding ring; we are married." She received the ring as a wedding ring. He then said: "We are married, just as much as Charles is to his wife, (referring to his brother and his sister-in-law.) I will live with you, and take care of you, all the days of my life, as my wife." She assented to this, and they went to a house where he had previously engaged board for "himself and wife," where they lived together, as man and wife, for about five weeks; he treating her as his wife, and addressing and speaking of her as such. *Held* that this was a valid marriage.

ACTION by the plaintiff, claiming to be the wife of the defendant, for a separation from bed and board, on the ground of abandonment.

C. A. Rapallo and *A. C. Brown*, for the plaintiff.

T. F. Donovan and *Henry Stanton*, for the defendant.

GEO. G. BARNARD, J. This is an action for a limited divorce on the ground of abandonment, under subdivision 3, section 51, article 4, title 1 of part 2 of the Revised Statutes. The allegation of abandonment is not contested, but the defense rests upon a denial of the marriage.

The plaintiff was examined as a witness in her own behalf, and the substance of her testimony is that she made the acquaintance of the defendant in January, 1867, while she was residing in Brooklyn, with the defendant's brother and his wife, in the capacity of nurse. The defendant resided at the same place, and there commenced paying attentions to her, which continued for several months, and resulted in an offer of marriage, in the latter part of June, 1867, which, after some hesitation on the part of the plaintiff, by reason of the difference in social station between her and the defendant, was finally accepted by the plaintiff. Very soon after the engagement, the defendant stated to the plaintiff that he did not believe in marriage ceremonies; that they might be legally married without any ceremony; that there were many such marriages, and he wished her to waive the ceremony. This, at first, she refused to do, but a series of conversations followed, during which the subject was discussed, the defendant urging his views, and contending that the marriage he proposed would be perfectly valid under the laws of the State of New York, and that they would be as validly married as if three clergymen should marry them, and as much man and wife as his brother and his wife were.

The defendant's arguments finally prevailed, and about the 1st of July the marriage day was appointed. The time fixed was the 15th of July. The defendant furnished the plaintiff with means to procure her marriage outfit, and, with the assistance of her married sister, Mrs. Stiesi, the plaintiff made her preparations for the marriage. On the 15th of July, the day appointed, the plaintiff left her sister's house, stating to her that she was going to be mar-

ried. She met the defendant in New York, and they proceeded to Central Park, where they took an open carriage, and while in the carriage the defendant produced a plain gold wedding ring, which had been made from another ring that she had given him for the purpose, about a fortnight previous. He placed the ring upon her finger, stating, "This is your wedding ring; we are married." She received the ring as a wedding ring. He then said: "We are married, just as much as Charles is to his wife, (referring to his brother and his sister-in-law.) I will live with you, and take care of you all the days of my life, as my wife." To this she assented, and they thereupon went to No. 110 Waverly Place, where he had previously engaged board for himself and wife. They were met at the door by the sister of Mrs. St. Clair—the lady of the house—who asked if they were Mr. and Mrs. Bissell, and the defendant answered in the affirmative. They lived there together, as man and wife, for about five weeks. During all the time the defendant treated her as his wife; addressed her, and spoke of her, as such.

Some time in August, the defendant, on the pretense of having met with pecuniary losses, induced the plaintiff to go to live with her aunt until his circumstances should improve. Since then he has abandoned and repudiated her, and entirely neglected to provide for either her or his child, which was born about May, 1868. Shortly before abandoning her, he induced her to sign a paper, drawn by himself, stating that no marriage ceremony had been performed between them.

The defendant was also examined as a witness, and testified that he never agreed to take the plaintiff as his wife; but alleged that it was agreed that she should live with him as a mistress, and that he should pass her off as his wife. And he alleged that he gave her the wedding ring so as to deceive other people, and not excite the suspicion that she was not his wife, as he feared that if they found

out, in the boarding house, that they were not married, they would turn them out.

There is no pretense that up to the time of the alleged marriage there had been any illicit intercourse between the parties.

The testimony of the plaintiff is corroborated by Mrs. St. Clair, who kept the boarding house; by her sister and niece, who live there, and who prove that before coming there to reside, the defendant engaged board for himself and wife. That while there they lived together as man and wife, treating and speaking of each other as such. Also by the testimony of Mr. and Mrs. Stiesi, who testify that the defendant assured them that, although no ceremony had been performed, he had married the plaintiff, and she was his wife and entitled to bear his name, and that if they had children they should be entitled to bear his name; and that they were as much man and wife as Mr. and Mrs. Stiesi, whose marriage had been solemnized in the usual form.

There can be no doubt that the testimony of the plaintiff proves an actual and valid marriage relation between the plaintiff and defendant. The Revised Statutes declare that "marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent of parties capable of contracting shall be essential." And it is well settled that no religious ceremony or form, of any description, is essential to the validity of a marriage. All that is requisite is, that the parties should be capable of contracting, and that they should actually contract to be man and wife. A mere agreement to marry at some future time, followed by cohabitation, will not constitute a marriage; but an agreement made in the present tense, whereby the parties assume towards each other the marital relation, is an actual marriage. This agreement may be written or verbal, with or without witnesses, and may be proved like any other con-

tract. When proved to the satisfaction of a court of justice, it constitutes a lawful marriage.

The cases cited by the plaintiff's counsel abundantly establish these propositions. (*Bishop on Mar. & Div.* §§ 78, 162. *Fenton* v. *Reed*, 4 *John.* 52. *Clayton* v. *Wardell*, 4 *N. Y. Rep.* 230. *Ferrie* v. *Public Adm'r*, 3 *Bradf.* 151. *Tummalty* v. *Tummalty*, *Id.* 369. *Grotgen* v. *Grotgen*, *Id.* 373. *Rose* v. *Clark*, 8 *Paige*, 574. *Matter of Taylor*, 9 *id.* 611. *Cheney* v. *Arnold*, 15 *N. Y. Rep.* 345. *Hayes* v. *The People*, 25 *id.* 390.)

In cases affecting the legitimacy of issue, rights of succession to property, and many other cases, such a contract may be proved by circumstantial evidence, by admissions of the parties, by their living together as man and wife, &c. But there is another class of cases, such as prosecutions for bigamy, *crim. con.*, &c., in which there must be direct evidence of the actual marriage. By actual marriage is meant, not the solemnization before a minister or magistrate—for, as has already been shown, no such solemnization is requisite—but what is intended is, that the actual making of the marriage contract, between the parties, must be proved by direct evidence, and not left to be inferred from circumstances, admissions and the like.

Until, by recent legislation, the wife was made a competent witness in actions in which her husband is a party, it is evident that where a marriage of this description was contracted in the absence of any witness, there was no means of furnishing the direct proof required in this class of cases, and offenses of this description might be committed with comparative impunity. But now, the wife being made a competent witness, her testimony, if corroborated and entitled to credit, is sufficient to establish the marriage.

The only question in this case, it seems to me, is as to the credibility to be attached to the testimony of the plaintiff and defendant respectively.

The plaintiff stands unimpeached and uncontradicted, except by the defendant, while she is corroborated by the testimony of Mrs. St. Clair, Miss Birch, Miss Knight and Mr. and Mrs. Stiesi. The elaborate cross-examination to which she was subjected failed to disclose any material discrepancy in her evidence, and nothing was shown to cast suspicion upon her truthfulness.

Opposed to her evidence are the denials of the defendant. His testimony is in direct conflict, not only with that of the plaintiff, but also with that of Mr. and Mrs. Stiesi. Independent of this direct contradiction by two apparently respectable witnesses, not parties to the litigation, the position assumed by the defendant, in his own testimony, is not one which commends him to consideration. According to his own testimony he was trying to seduce the plaintiff. The circumstances of the case—even those detailed by him—indicate that she was a virtuous girl; and he himself testifies that at first the shameful proposals, which he asserts he made, were rejected by her in such a manner as to lead him to suppose that they would never meet again. The defendant now comes into court, stating that, notwithstanding this rebuff, he persisted in his infamous attempt, and finally succeeded in accomplishing her ruin; and he admits that without cause he subsequently abandoned her and contracted a marriage with another party, who, it is proved, was fully cognizant of the pendency of this action, having been a witness in the defendant's behalf, in one of its preliminary stages. And now the defendant, confessing himself capable of the depravity with which he thus charges himself, asks to be credited as a reliable and candid witness in his own behalf.

Considering the impeachment of his moral character which is furnished by the defendant's own testimony, the direct contradiction of his statements by at least two credible witnesses besides the plaintiff, in a very material point—namely, as to his declaration to them that he was

lawfully married to the plaintiff—and his admissions and conduct towards the plaintiff, the court feels warranted in discrediting and rejecting the defendant's version of the transaction, and is satisfied and decides that an actual marriage was contracted between the parties, as testified to by the plaintiff.

If this be so, there is no reason why the defendant should not be held to the consequences of his acts; and if, while endeavoring to accomplish a seduction, he has blundered into matrimony, he has no one but himself to blame. If the practice is as common as the defendant alleges, of men passing off their mistresses as their wives, and allowing them to bear their names without any marriage contract, it is time that they should learn the risks to which they expose themselves in thus trifling with the marriage institution, and that a check should be put upon practices so dangerous to the good order of society.

There should be a decree declaring the plaintiff to be the lawful wife of the defendant, and their child to be legitimate, and adjudging a limited divorce and alimony, with costs and reasonable expenses of the litigation; and the temporary alimony allowed by Judge INGRAHAM should be increased.

[NEW YORK SPECIAL TERM, November 1, 1869. *Geo. G. Barnard*, Justice.]

THE BOARD OF COMMISSIONERS OF EXCISE OF ORANGE COUNTY *vs.* JAMES DOUGHERTY.

A license to sell liquors to be drank on the premises, issued under the excise act of 1857, (*Laws of* 1857, *ch.* 628,) is not only a license to the licensee to sell, &c., but is also a license to sell liquor at a particular place. A license so issued will protect the agent or clerk of the licensee; but a person selling as the agent or clerk of a person, or at a place, not licensed, cannot obtain immunity by claiming that he acted for another party.

A husband guilty of a violation of the statute cannot relieve himself from liability by setting up the defense that his wife owned the tavern where the liquor was sold, and that he sold as her agent; where there is no proof that the wife had any license.

THIS is an action brought by the plaintiff to recover from the defendant five penalties for violations of the following section (being section 13) of the act of 1857, known as the excise law:

"Whoever shall sell any strong or spirituous liquors or wines in quantities less than five gallons at a time, without having a license therefor granted as herein provided, shall forfeit $50 for each offense."

The case was tried before his honor Judge GILBERT and a jury, at the circuit court held at Newburgh in April, 1869. Upon the trial the plaintiff proved by Mary Martin that she had frequently bought liquor or spirits in quantities less than five gallons at a time, at the place of residence of the defendant, and paid for it; that the defendant kept a store, with a bar in it, for the sale of liquors; that the purchases had sometimes been made of the defendant and sometimes of his wife; that she bought it of the defendant sometimes by the glass, to drink on the premises, and sometimes by the small measure, to take home. The plaintiff proved by William Martin substantially the same facts, with the additional one that there was no sign over the door of the store where the liquors were sold. From the testimony of James Scott, it appeared that the place where these liquors were sold was another from that where

Mrs. Dougherty, previous to her marriage, had kept store; and that Mr. Dougherty, the defendant, and his wife lived together at the place where the testimony showed liquor to have been sold. After making formal proof of the bringing of the suit in due form of law, the plaintiff rested. The defendant being sworn, testified that his wife kept the store where the liquor was sold as above proven, and that "the property belongs to her." Upon his cross-examination, it appeared that he was cognizant of the fact that liquor was kept and sold at that place, and also of its being bought by his wife. After which testimony the case was closed, and submitted to the jury upon the charge of the court. Certain requests to charge were made by the plaintiff's counsel and denied by the court. To the charge and decision of the court, certain exceptions were taken. The jury rendered a verdict for the defendant. Leave was granted to the plaintiff to make a case. Judgment was duly entered upon the verdict, and from that judgment this appeal was taken by the plaintiff.

Duryea & Bacon, for the appellant. The questions to be reviewed arise upon the exceptions to the charge. It is insisted on behalf of the appellant that the defendant, under the proof, was liable,

1st. As the husband of Mrs Dougherty, who, he swore, carried on the business with his knowledge, and with whom he then lived; and if not as the husband, then,

2d. As the agent of Mrs Dougherty; and that the charge of the learned judge was erroneous in so far as he charged that "the only question is, who made the sale? in other words, whether the defendant acted as principal or as agent of his wife."

It is also insisted that the learned justice erred in refusing to charge as requested by the plaintiff, that if the jury found that the bona fide principal of the establishment was

Mrs. Dougherty, and that the sales in question were made by the defendant in the capacity of an agent for her, that was a complete defense to the action; also, that if the wife was carrying on the business of selling liquor without license, and the defendant, being her husband, as her agent, sold liquor at the times stated in the complaint, in quantities less than five gallons, to be drank on the premises, and took pay for it, he was liable.

I. The husband is liable for a forfeiture under a penal statute incurred by the wife. (*Bac. Ab. title Baron and Feme, 3d ed., p.* 356. *Hasbrouck* v. *Weaver*, 10 *John.* 247. *The Board of Commissioners of Excise of Wayne County* v. *Keller*, 20 *How.* 280.) The common law rule was well established as above. The statutes relating to the rights of married women have not diminished the privileges of the wife, nor relieved the husband from any of his liabilities in relation to any of her acts, except contracts affecting her separate estate, and suits brought for her own benefit, in strict accordance with the statute. The liability of the husband for the torts of the wife remains unchanged. The liability of the husband in actions of this character is in all respects analogous to his liability for torts of his wife, and has not been altered by those statutes. (*Schaus* v. *Putscher*, 25 *How.* 463. *Hortin* v. *Payne*, 27 *id.* 374. *Matthews* v. *Fiestel*, 2 *E. D. Smith*, 90. 20 *How.* 280, *above quoted.*) The legal presumption of coercion by the husband, of the wife, is not rebutted by any testimony in this case; but the facts shown are of such a nature that it is evident that it was incontrovertible. Any other rule of construction of this statute than that contended for would be against public policy.

II. An agent is personally liable for his own acts of direct and positive wrong. A person who freely does an illegal act cannot relieve himself from the legal consequence of such act by claiming that he did it as agent. The statute

says "whoever shall sell"—making no exception for the case of one selling as agent. The only act of the defendant necessary to be proven, to fix his liability, is the sale. The rule is fully established that an agent is personally liable to third persons for his own misfeasance and positive wrong, and the foundation of this rule is stated by Mr. Justice Story (*Story's Agency, p.* 316) to be that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses; for no man can authorize another to do a positive wrong. (*Story's Com. on Agency, ch.* 12; *authorities quoted on pages* 318, 319.) On page 318, section 312, the learned commentator says, "*a fortiori*, if the principal is a wrongdoer, the agent proven innocent in intention, who participates in his acts, is a wrongdoer also." (*Wright* v. *Wilcox*, 19 *Wend.* 343. *Vanderbilt* v. *The Richmond Turnpike Co.*, 2 *Comst.* 479. *Sraights* v. *Hawley*, 39 *N. Y. Rep.* 441.) The rule is equally well settled in criminal law, both with regard to breaches of the excise law and all other misdemeanors. (1 *Chitty's Cr. Law*, 261. *Whart. Cr. Law*, § 2437, *and cases therein quoted. The People* v. *Adams*, 3 *Denio*, 190. *The People* v. *Erwin & Clark*, 4 *id.* 129. *French & Conklin* v. *The People*, 3 *Parker*, 114.) Actions of this character are *quasi* criminal. The liability of a defendant in an action of this character cannot be more restricted than it would be in the case of an indictment for the offense of selling liquor without a license.

III. Errors in the charge to the jury, and refusals to charge as requested, being duly excepted to, are sufficient grounds for a reversal of judgment. (*Wardell* v. *Hughes*, 3 *Wend.* 418. *Palmer* v. *Andrews*, 7 *id.* 142. *Sayre* v. *Townsend*, 15 *id.* 647. *Castanss* v. *Ritter*, 3 *Duer*, 710. *Kimball* v. *The Hamilton Fire Insurance Company*, 8 *Bosw.* 495.)

J. Hallock Drake, for the respondent.

By the Court, TAPPEN, J. The action was brought to recover of the defendant five penalties of $50 each, for selling liquor without a license, under section 13 of the act of 1857, known as the excise law. (*Laws of* 1857, *vol.* 2, *p.* 405.)

The sale by the defendant was clearly proven, and the defense relied upon was that his wife owned the tavern, and that he sold for her. The charge of the judge was in substance that if the defendant sold as principal, he was clearly liable, but if he sold as the agent of his wife, that was a complete defense. The jury found for the defendant, and the case is reviewed upon suitable exceptions to the charge.

The statute in question requires that persons licensed to sell liquors to be drank on the premises, shall propose to keep an inn or tavern, &c. So that a license is not only to the person to sell &c., but is also a license to sell liquor at a particular place. A license so issued would protect the agent or clerk of the licensee; but a person selling as the agent or clerk of a person, or at a place not licensed, cannot obtain immunity by claiming that he acted for another party.

In the *Excise Commissioners of Wayne* v. *Keller*, (20 *How.* 280,) the wife kept the place with her own means, conducted the business and sold the liquor, and the husband was held liable to the penalty. In that case the offense was subsequent to the act of 1860 concerning the liabilities of husband and wife, and the case of *Hasbrouck* v. *Weaver*, (10 *John.* 247,) is quoted. There the wife sold whisky in in the absence of her husband, and the court said, approving a rule laid down in *Hawkins*, "the husband is answerable for a forfeiture under a penal statute incurred by the wife."

It was not claimed on the trial of the case now under consideration that the wife of Dougherty had any license; it was apparently conceded, and in his charge the learned judge said: "There has been a clear violation of the

statute proven;" so that the point now raised by the defendant that the plaintiff failed to show that the defendant's wife had no license, can have no force here, not being raised at the trial, but being at variance with the course of the defense at the trial.

We think a violation of the 13th section of the act was established by the evidence against the defendant, and his agency does not, under the quoted decisions, relieve him of liability.

Judgment reversed and a new trial granted; costs to abide the event.

[KINGS GENERAL TERM, December 30, 1869. *J. F. Barnard, Gilbert* and *Tappen*, Justices.]

EDWARD H. STRONG *vs.* SARAH W. DEAN, executrix &c. of George P. Dean, deceased.

Under the section of the Code, declaring that a party shall not be allowed to be examined as a witness in his own behalf, "in respect to any transaction or communication had personally by said party with a deceased person, against parties who are executors or administrators of such deceased person," a plaintiff, in an action against an executrix, cannot be allowed to testify as to notes made by the deceased to the order of, and indorsed by, the plaintiff, and which were transactions had personally between them.

In such a case, the test of the admissibility of the testimony is, does it tend to prove what the transaction was?

A paper, by which the person executing the same, for and in consideration of a mortgage given to him by another to secure the payment of $600, exonerates the latter from all notes or papers that he holds against him, operates as a *release*, according to its terms, and extinguishes the debt due upon a note of the releasee, for $600, held by the releasor at the time.

The burden is upon the person executing such an instrument, to overcome the effect of it as a release; which cannot be done by parol.

And proof that there were other notes, amounting in the aggregate to the sum of $600, the consideration named in the release, which were intended to be, and were, released, does not tend to explain such release, or to exclude from its operation the $600 note.

If such $600 note is past due when the release is executed, the indorsement, by the releasor, upon the note, of the receipt of interest after the date of the release, and when the note was in his hands, is not proof of any such payment of interest by the maker.

THIS is an appeal from a judgment entered upon the report of referees appointed in accordance with the statute to hear and determine a claim against an executor, which was disputed. Upon the trial the plaintiff proved by William H. Hughes, and put in evidence, the following note made by the deceased:

"$600. Blooming Grove, May 16th, 1864.

Twelve months after date, for value received, I promise to pay to Edwd. H. Strong, or bearer, heirs or assigns, the sum of six hundred dollars with interest from date. The interest I promise to pay in quarterly payments as follows: on the 1st days of July, Octo. and Jan. and April following; and for his better security I assign to him a Life Insurance Policy.

(U. S. Rev. Stamp, 30c. canceled.) GEORGE P. DEAN."

[*Indorsements.*]

"Received the interest due on the within Note up to November 16, 1864. E. H. STRONG."

"Received the amount of interest due on the within Note to August 16, 1865. E. H. STRONG."

The plaintiff was called to support his case, and to his testimony an exception was duly taken. The plaintiff then rested. The defendant then proved and put in evidence the following release from the plaintiff to the deceased:

"This is to certify that I, Edwd. H. Strong, for and in consideration of a certain Mortgage given me by George P. Dean, bearing date July 1st, 1865, to secure the payment of six hundred dollars, do exonerate the said George

P. Dean from all notes or papers that I hold against him, and from all notes that I have indorsed for him that are made payable at any bank or to any party, I hold myself responsible for the same.

Blooming Grove, July 17th, 1865.

EDWARD H. STRONG.

Signed in the presence of F. A. Hoyt."

Also a mortgage made in accordance therewith, from the deceased to the plaintiff. The defendant then rested.

The plaintiff then offered and gave testimony (subject to exception of the defendant) tending to explain the release aforesaid, and showing that the deceased, at the time of giving such release and mortgage, was largely indebted to the plaintiff, in addition to his indebtedness upon the note. The majority of the referees, being laymen, reported in favor of the plaintiff, and after finding the facts as above, found, as conclusion of law, that the defendant, as executrix, was indebted to the plaintiff in the amount of such note, and directed judgment accordingly. From which finding of law and direction of judgment the other referee dissented. Judgment was entered upon such report in favor of the plaintiff. The defendant duly excepted to the finding of law of the majority of the referees, and appealed from such judgment.

Duryea & Bacon, for the appellant. The questions to be reviewed arise, *first*, upon certain exceptions taken to the testimony of the plaintiff himself, as being evidence in regard to transactions had with a deceased person: *second*, as to the legal effect of the release; and in that regard, as to, first, the admissibility of testimony duly excepted to; second, as to the correctness of the conclusions of law found by the majority of the referees. It is alleged and insisted on the part of the appellant that the testimony given was improper and inadmissible, and that the conclu-

sions of law found by the majority of the referees are erroneous, and that judgment entered thereon should be reversed with costs.

I. Any testimony given by a party to an action or proceeding against an executrix, with regard to, or which tends to show or explain, a transaction had with a deceased person, is improper and inadmissible. (*Sec.* 399 *of the Code of Procedure, as amended* 1867. *Stanley, adm.*, v. *Whitney*, 47 *Barb.* 586. *Angevine, adm.*, v. *Angevine*, 48 *id.* 417. *Van Alstyne and others, ex'rs*, v. *Van Alstyne*, 28 *N. Y. Rep.* 375. *Kerr, adm.*, v. *McGuire, Id.* 446.) It is apparent that the transaction between Strong and the deceased, with regard to the notes, so far as the same can establish a debt against the deceased, is proved only upon the testimony of the plaintiff, and that testimony tends to prove what that transaction was. In the case of *Stanley* v. *Whitney*, (47 *Barb.* 586,) the court says: "It is of no consequence what the form of the question or of the answer was. * * The only question is, does it tend to prove what the transaction was?"

II. The release was a memorandum of a contract between the plaintiff and the deceased, reduced to writing, and signed by the party to be affected thereby. It possesses all the necessary parts of a contract, there being two parties agreeing, for a valuable consideration, to do on the one part and not to do upon the other certain things. The consideration was of the species given as the second species of valuable consideration by Blackstone—*facio ut facias.* (*Black. Com., Book* II, *marg. paging* 444. 1 *Pars. on Con.* 6. *Frink* v. *Green and others*, 5 *Barb.* 455.)

III. The said paper amounted to and operated as an absolute release of George P. Dean from the payment of all notes and papers held by the plaintiff against the deceased, or upon which he was indorser, and expressed and was given for a valuable consideration. (*Cuyler* v. *Cuyler*, 2 *John.* 186. *Phelps, adm.*, v. *Johnson*, 8 *id.* 54. *Farmers'*

Bank of Amsterdam v. *Blair*, 44 *Barb.* 641. *Battle* v *Coit*, 26 *N. Y. Rep.* 404. *Eccleston* v. *Ogden*, 34 *Barb.* 444. *Stearns* v. *Tappin*, 5 *Duer*, 294. 2 *Pars. on Con. pages* 130–132, *and pages* 220–224, *and notes thereto, and cases cited.*)

IV. The said paper operated as an estoppel *in pais* upon the plaintiff, and created in law a conclusive presumption of payment of all notes outstanding at the time of its execution. It was an admission *extra judicium* upon which the deceased had acted, and which therefore the plaintiff could not be permitted to deny. (*Greenl. Ev.* §§ 22, 27, 207, 208. *Welland Canal Co.* v. *Hathaway*, 8 *Wend.* 480. *Dezell* v. *Odell*, 3 *Hill*, 215. *Ryerss* v. *Farwell*, 9 *Barb.* 615. *Eccleston* v. *Ogden*, 34 *id.* 444. *Hawley* v. *Griswold, impleaded &c.*, 42 *id.* 18.) In the case of *Dezell* v. *Odell*, above cited, the court says: "Where a party, either by his declaration or conduct has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequences would be to work an injury to such third person or to some one claiming under him." In the case of *Ryerss* v. *Farwell*, the court, in defining estoppel *in pais*, says: "They generally consist of acts, declarations or admissions which have been acted upon by others, and are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced."

V. If the said paper was either a contract reduced to writing or a release, or operated as an estoppel or an admission conclusive in law, then all the testimony admitted after the defendant had rested was, 1st, improper, as tending to vary the terms of a written contract; 2d, irrelevant and immaterial, as the fact of there being other debts, the total being greater than the sum for which the mortgage was given, could not be urged against a full release; 3d, improper, as being in conflict with the acts and admissions of the plaintiff upon the faith of which the deceased

had acted and by which the defendant was therefore estopped, and which had raised a presumption of law conclusive against him. (*Buckley* v. *Bentley*, 48 *Barb.* 283. *Van Brunt* v. *Van Brunt*, 3 *Edw.* 14. *Stearns* v. *Tappin*, 5 *Duer*, 298.)

VI. If the positions above taken with regard to said paper are correct, it is insisted that the conclusions of law found by the majority of the referees are erroneous.

VII. If errors were committed, either in the admission of evidence or in the conclusion of law found by the referees, the judgment should be reversed. (*Marquand* v. *Webb*, 16 *John.* 89. *Osgood* v. *Manhattan Company*, 3 *Cowen*, 612. *The People* v. *Wiley*, 3 *Hill*, 194. *Worrall* v. *Parmelee*, 1 *Comst.* 519.)

David F. Gedney, for the respondent.

By the Court, TAPPEN, J. The defendant's testator had certain moneyed transactions with the plaintiff, and the proofs show the following, viz: 1. The testator's note, date May 16th, 1864, for $600, at twelve months, with interest, payable to the plaintiff or bearer. The action is brought on this note, which contains the following clause: "and for better security, I assign to him a life insurance policy." The note contains indorsements by the plaintiff of the receipt of interest to November 16, 1864, and August 16, 1865. The testator died in 1866. 2. An assignment by Dean and wife of a policy of life insurance, as security for the payment of that note. The assignment is also dated May 16, 1864. 3. A paper signed by the plaintiff, dated July 17, 1865, in consideration of a mortgage for $600 received from Dean, dated July 1, 1865, "exonerating Dean from all notes and papers that I hold against him, and from all notes that I have indorsed for him that are made payable at any bank or to any party, I hold myself responsible for the same." 4. The mortgage referred to, for $600.

There were various other note transactions, of small amounts, between the parties in the years 1864 and 1865.

The case was tried before three referees appointed by a surrogate's order, under the statute in regard to contested claims against the estates of deceased persons. Two of the referees (laymen) found for the plaintiff, the other referee (of the legal profession) agreed with them as to the facts, but dissented from the conclusion that the testator was indebted upon the note in question.

The plaintiff's testimony as to his transactions personally with the deceased was not admissible. The notes in respect to which he was testifying were made by the deceased to the order of, and indorsed by, the plaintiff, and were transactions had personally between them. (*Code*, § 399.) And in 47 *Barb.* 586, it is said the test is, "does the testimony tend to prove what the transaction was."

The paper signed by the plaintiff, and offered on the trial by the defendant as a release of all notes and papers, operated as a release, according to its terms, and extinguished the debt. (5 *Duer*, 294.) The burden is upon the plaintiff to overcome the effect of the release, which cannot be done by parol; and proof that there were other notes amounting in the aggregate to the sum of $600, the consideration named in the release, which were intended to be, and were, released, does not tend to explain the release, or to exclude from its operation the note in suit.

The note was past due when the release was given, (July, 1865.) The indorsement by the plaintiff, upon the note, of the receipt of interest in August, 1865, after the date of the release, and when the note was in the plaintiff's hands, is not proof of any such payment of interest by the deceased.

The judgment should be reversed, and judgment ordered for the defendant.

[KINGS GENERAL TERM, December 30, 1869. *J. F. Barnard*, *Gilbert* and *Tappen*, Justices.]

55 344
122a 196

THE PEOPLE *vs.* THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY and others.

Under and by virtue of the provisions of sections 428, 432 and 440 of the Code of Procedure, an action may be brought by the Attorney-General, in the name of the people, upon his own information, against several persons, consisting of two distinct classes, each claiming, by virtue of separate elections, to be the board of directors of a corporation, for the purpose of trying their respective rights to such office; whether either of such elections was regular and legal, and if so, which of them; and if neither of such boards shall be declared duly elected, then that both classes of defendants be removed from office, and a new election ordered.

Such action must be commenced and prosecuted like other civil actions, and is to be governed, in respect to the pleadings and proceedings, by the same rules.

In such an action, the relief demanded consists in, and the nature of the case requires, the exercise of the equitable powers of the court; and an injunction may be issued, and a receiver be appointed, as the usual and appropriate instrumentalities of a court of equity.

The issues of fact, in such an action, are in the first instance triable by the court; which may, however, order the whole issue, or any specific question of fact involved therein, to be tried by a jury.

But if no application for, or suggestion of, a jury be made until after the action has proceeded to trial, and the Attorney-General has opened the case, in behalf of the people, read the pleadings, and rested, such an application, then made, will be too late, and the trial must proceed.

Where persons chosen inspectors to conduct an election for directors of a corporation do not qualify and act, having been restrained from so doing by injunction, the stockholders may, at the time appointed for such election, proceed to choose other persons as inspectors.

Although it is not lawful to open the poll, at an election of directors of a corporation, before the time fixed in the notice, yet after the election has commenced, it is not improper for the inspectors to keep it open as long, within a reasonable discretion, as is necessary to receive the votes of all the stockholders present, ready and offering to vote.

Where the president of a corporation requests an individual to call to order a meeting of stockholders for electing directors, and to act for him, in his absence, such request is a sufficient authority for such person to act in the place of the president.

All acts done by a portion of the stockholders in a corporation, at an election of officers, which bear the appearance of trick, secrecy or fraud, will be held invalid. Surprise and fraud in respect to another portion of the stockholders, is ground for avoiding an election.

Where the notice of the time of holding an election of directors was for 12

o'clock M., and there was nothing in such notice to apprise the stockholders that there was any occasion for their assembling at an earlier hour, or that any other business was to be transacted, except that of the election; *Held* that a meeting called to order, under such notice, and organized, about 15 minutes before 12 o'clock, was a surprise and fraud upon many of the stockholders, and as against such of them as did not participate in the meeting, was irregular and void. And that an election of inspectors, and a subsequent election of directors, at such meeting, were void and of no effect.

Held, also, that such irregularity could not be cured by a reorganization of the meeting at 12 o'clock, where such meeting was in fact and in legal effect but a continuation of the first meeting; there being no abandonment of the room, and no formal organization of a new meeting in the ordinary way.

It is the law of joint stock corporations that a majority of the stockholders, in interest, shall control in the election of the officers of a company, and in its management.

Where there was a preconceived scheme, combination or conspiracy on the part of a portion of the stockholders in a railroad corporation, to carry an election of directors, and thus get the control of the road, by the use and abuse of legal process and proceedings, and by their efforts and contrivances to prevent a fair election of inspectors at a preliminary meeting of stockholders; which conspiracy was carried into effect by those means, together with the concurring preoccupation of the room where such meeting was to be, and was, held, by such a number of persons, not stockholders, as utterly precluded a free and fair meeting for such purpose; *Held* that an election of directors held under these circumstances, by inspectors so chosen, was irregular, fraudulent and void.

A court of equity has no power to restrain a public officer, or an officer duly elected or appointed by a corporation, from performing the general, ordinary and proper duties of his office.

It may restrain him from doing some particular wrong or injury affecting private rights, and it may suspend or remove a director or trustee of a private corporation, upon due cause being shown and due notice given, for any gross violation of duty, or corruption in office; but it cannot remove him by injunction, without notice, or without a hearing. *Per* E. D. SMITH, J.

An injunction by which inspectors of election in a corporation are commanded to desist and refrain from holding any election of directors, or from receiving and counting and canvassing any votes, is entirely void. So as to an injunction forbidding an individual to act as president of a corporation.

But an injunction requiring such inspectors, their successors, &c., to desist and refrain from serving as such inspectors, or to hold any election for directors, until the further order of the court, at any election on a day specified, or any subsequent day, while the plaintiffs and the other owners of 3000 shares of stock shall be enjoined, or they be forbidden to vote upon the same, by any injunction, order, judgment or process of any court; or to receive any vote or votes from or on the part of certain stockholders named,

for themselves or as proxies for others, until the plaintiffs and the other holders of the 3000 shares shall first have an opportunity to vote upon said shares, respectively, is valid; and as such, it is the duty of the inspectors to obey it.

Where an election of directors would doubtless have been set aside, on a summary application to the court, pursuant to section 5 of title 4, chapter 8, part 1 of the Revised Statutes, on the ground that it was held in distinct violation of an injunction, the fact that the election was so held in violation of an injunction will be considered, in an action brought by the Attorney-General, for the purpose of testing the regularity of the election.

There can be no such officer as an officer *de facto*, as against the people, in an action at the suit of the people, to try the title to the office. The doctrine in respect to officers *de facto* only applies to, and in favor of, third persons, and to protect innocent parties who have trusted to the apparent title of an officer.

THIS is an action brought by the Attorney-General upon his own information, in pursuance of section 432 of the Code.

The complaint states that the Albany and Susquehanna Railroad Company is a corporation created by, and existing under, the laws of the State of New York, organized for the purpose of constructing, maintaining and operating a railroad under the general laws of this State; that they own and operate a railroad from Albany to Binghamton in this State; that the stockholders of said company are divided into two parties, each claiming to hold a majority of the stock of said company, and each claiming that they are rightfully entitled to a majority of the legal votes cast at an election of directors of said company, which was held in the city of Albany on the 7th day of September, 1869; that these differences led, prior to said 7th day of September, to a series of litigations, and gave rise to a number of actions. One of these actions was brought in the Supreme Court, in the first judicial district, by Joseph Bush, against said company and others, for the cancellation of certain stock, and an injunction was granted therein against the conversion of bonds into stock, and a receiver of said stock was appointed. Another suit was brought in said court in the county of

Otsego, by the town of Oneonta, wherein an injunction was issued against the commissioners of said town, enjoining them from voting on certain stock. Another suit was brought in said court, in the first judicial district, by David Wilbur, plaintiff, against said company and others, wherein an injunction was issued. Another action was brought in said court and district, by said Wilbur, against said company and others, in which an injunction was issued. Another action was brought in said court and district by Azro Chase, wherein the defendants, James Fisk, Jr., and Charles Courter, were appointed receivers of said road; and the said receivers gave bonds, and took, or claimed to take, possession of said railroad. Another action was brought in the name of said railroad company, in the county of Albany, against Jacob Leonard and others, wherein an injunction was granted; and another action was brought in said court, wherein John W. Van Valkenburgh was plaintiff, and the said company was defendant, wherein Robert H. Pruyn was appointed receiver of said company, and he filed his bonds and took, or claimed to take, possession of said road. Another action was brought in said court and county, wherein the said road was named as plaintiff, and the directors and both receivers were named as defendants, wherein an injunction was granted. Another action was brought by said Pruyn in the county of Albany, against the sheriffs of different counties, wherein an injunction was issued; that another action was brought by Jay Gould against said company, and that various proceedings for contempt, in violating injunctions on both sides, had been instituted. All such proceedings are now pending and undetermined, and various other suits between the contending parties are in progress or threatened. And that the controversies arising out of such actions and litigations have given rise to conflict of authority between public officers, in attempts to execute conflicting processes from different judicial offi-

cers, to such an extent as seriously to threaten the public peace along the line of said company's railroad; that such controversies were temporarily quieted by an agreement between the contending parties, of which the following is a copy:

"ALBANY, August 11, 1869.

To the Governor of the State of New York:

By virtue of certain judicial proceedings, and conflicts of jurisdiction and collisions, it has become, and is, impracticable to operate and run the Albany and Susquehanna Railroad, either under the management of the directors, or the control of the persons claiming to be receivers. The public interests and the obligations of the company demand that the road should be run and operated, and the undersigned, as contending claimants to the possession of the road, hereby request you to appoint some suitable person or persons to act as superintendent, and to run and operate the road under your directions and during your pleasure, or until the necessity of such superintendence shall cease; said appointment, and the possession by yourself and the person or persons to be appointed, not to affect the legal rights, or the present actual possession, of the parties, respectively, to any part of said road, or the offices or property thereof. It is understood that you are to employ such agencies, financial or otherwise, as you may require, and to fix the compensation of all persons employed by you."

That in pursuance of this request, the Governor appointed Robert L. Banks executive and financial agent, to run and operate said road, and that the said Banks entered upon the discharge of said trust, and has since continued to have the charge and management of the same.

That on the 7th of September, then inst., the day fixed for the annual election for directors for said company, each of said contending parties holding or pretending to hold an election separate and apart from the others, elected

a separate board of directors. One of said parties elected, or pretended to elect, J. Pierpont Morgan and twelve other persons named and made defendants in this suit; and the others of said contending parties elected, or pretended to elect, as directors of said company, Charles Courter and twelve other persons named as defendants in this suit.

The plaintiffs further allege, on information and belief, that both of said elections were illegal, irregular and void; that the inspectors of each side were appointed in a manner not authorized by law, or by the by-laws of said company; that stock was voted on, by persons not authorized to cast a vote thereon; that the inspectors on both sides were restrained by injunctions, while the election was going on, from acting according to their own judgment; that the transfer books were not present, and were not produced, although demanded by several stockholders; that several towns along the line of said road are owners of the stock of said company, and that three or more of such towns were represented at said election by rival commissioners, and votes on such stock were cast on each side.

That Joseph H. Ramsey has given notice of the presentment of a petition to the Supreme Court for the removal of the last named board of directors, and for the confirmation of the election of the first named board of directors; that another action has been brought in the name of Eli Perry, as plaintiff, to restrain the last above named board of directors, Charles Courter and his associates, from acting as directors; that five other suits have been brought in relation to the said matters referred to, in one of which the defendants Groesbeck, Chamberlain, Morrell, Boyd, Vincent and Falls are plaintiffs; in another the said company and J. H. Ramsey are named as plaintiffs; in another, John W. Van Valkenburgh; in another, Minard Harder, and in another, John Eddy, as plaintiffs.

That the plaintiffs are informed that the last named board threaten and intend to bring suits to compel the delivery to them of the property of the company, and to secure the recognition of their claims as directors of said company.

The plaintiffs further allege, that each of said pretended boards of directors threaten and intend to take or claim to have possession of said railroad, and all the property, books and papers belonging to said company, and to exercise all the franchises, privileges and corporate rights granted to said corporation; and the plaintiffs allege and insist that such claims are without foundation in right, and if such threats are carried into execution by either of said contending boards of directors, it will be a usurpation of the franchises and corporate rights of said corporation, and will lead to a conflict of judicial authority, and to a breach of the peace and the good order of the community. The plaintiffs further allege, upon information and belief, that large amounts of the stock of said company, and other property of said company, have been alienated and transferred by the officers of said company, contrary to law and foreign to the business of said company, and particularly to a number of persons therein named.

The plaintiffs further state, that the Governor is desirous of being relieved, and of relieving those appointed by him in the management of said railroad, and from the positions occupied and the responsibility borne by them under the agreement aforesaid; that the Governor cannot determine, without danger of doing injustice to one of the parties, whether either of said boards, and if either, which of them is lawfully entitled to the possession and management of said road, and of the company's affairs; that the decision of the Governor, if made, would not have the force of a judicial determination, and might result in injury to the corporation.

That the Governor has, therefore, requested that this

action be brought, in order that the said railroad may be placed under the direction and control of competent judicial authority, independent of both contending parties, until the rights of the respective parties to the said controversy can be judicially determined. The complaint prays for an injunction against the defendants composing the two boards of directors, restraining them from taking possession of, or in any manner interfering with, the said railroad, or any of its property, books and papers, and from exercising the franchise privilege or corporate rights of said corporation, and from acting as directors or officers of said corporation; also, that it be adjudged whether either of the said elections was regular and legal, and if either, which of them; that if neither of said boards be declared duly elected, and entitled to hold office under said elections, that both classes of said defendants be removed from office and a new election ordered by the court. Also, that the defendants be restrained from prosecuting any of the suits heretofore brought as above stated, and from commencing any new suits or proceedings in relation to said controversy, and that they be restrained from holding any other election of directors of said company. Also, that receivers Pruyn, Courter and Fisk be restrained from taking possession of said railroad, or in any way or manner interfering with the same, and that a receiver be appointed to take possession of the road.

The defendants composing the board of directors, embracing Walter S. Church, Charles Courter, James Fisk, Jr., and others, answered the complaint, and set up that they were in all respects lawfully elected directors of said company, at the time and place mentioned in said complaint, and claim that said election was fairly and lawfully conducted, so far as relates to their own election, and deny the validity of the election of the other board, headed by J. Pierpont Morgan, and deny that such election was held by legal inspectors, and allege that such inspectors

did not take their places, or receive votes, or act as inspectors, until more than twenty minutes after the regular inspectors had commenced to act, and more than twenty minutes after the time fixed by the by-laws of said company for opening the polls; and they in effect admit, otherwise, the general allegations of the complaint, and demand judgment that the election of these said defendants as directors of said corporation be declared and adjudged regular and valid, and that the said defendants, Walter S. Church, Charles Courter and their associates, be put in possession of the property and franchises of said corporation, and an injunction issued, as asked for in the complaint, against the said Morgan and others claiming to act as directors of said corporation as against the said defendants.

The defendants, J. Pierpont Morgan, Robert H. Pruyn and others, comprising the other board of directors, in like manner answered the complaint, asserting the legality of their elections and denying the legality of the election of the said board headed by Walter S. Church, Courter and others, and deny that James Fisk, Jr., and Charles Courter were lawfully appointed receivers, and insist that such appointment was illegal and void, and allege that a receiver of said road had been previously duly appointed and was in possession of said road at the time of such appointment, and that the pretended order appointing Fisk and Courter receivers, and all other orders and injunctions, including said order appointing said receivers, were obtained by false and fraudulent misrepresentation and suppression of the truth, and in aid of a conspiracy against the interests of said railroad and the stockholders thereof, and in order to get the possession, control and management of said road away from the stockholders of said company, to the end that it might be managed and controlled in the interest and for the benefit of Jay Gould, James Fisk, Jr., and others acting with them and otherwise; in

effect admit the general allegations of the complaint, insisting that all that had been done by them or others acting with them had been lawful and fair and properly done for the best interest of said corporation; and demand judgment that the said directors, J. Pierpont Morgan and his twelve associates, may be adjudged and declared duly and legally elected and rightful directors of said company, and as such entitled to the possession of its property and to the exercise of the rights and franchises thereof; and that the election of the said Charles Courter, James Fisk, Jr., and others, be declared illegal and void, and that the stock whose validity was questioned in the complaint be established, and that an injunction issue as asked for in the complaint, against the said Charles Courter and others, restraining them from interfering with the property of said corporation. Two answers were put in nominally by the railroad company, by different attorneys; each claiming to represent the corporation, &c.; said answers concurring in substance with the answers of the said respective board of directors, as above stated.

Answers were also put in by the other defendants—Dabney, J. P. Morgan, Goodwin, George H. Morgan, Bush, Groesbeck, Chamberlain, Vincent, Morrell, Falls, Boyd, Sloan, Thompson and Green—denying the allegations of the complaint in respect to such parties, so far as such allegations question the validity of the stock held by them respectively, and asserting the validity of such stock, and of their title to the same, and therein admitting the general allegations of the complaint.

The issue thus formed came on for trial at an adjourned special term and circuit, held at Rochester on the 20th day of November, 1869, when

Marshall B. Champlain, (Attorney-General,) *George G. Munger* and *Stephen H. Hammond*, (Assistant Attorney-General,) appeared for the people.

William F. Allen, *Charles Tracy*, *Aaron J. Vanderpoel*, *Henry Smith*, *Matthew Hale* and *John H. McFarland*, appeared as counsel for Joseph H. Ramsey, J. Pierpont Morgan and other defendants.

David Dudley Field, *John H. Martindale*, *William C. Barrett* and *Dudley Field*, appeared for James Fisk, Jr., Jay Gould, Charles Courter, Walter S. Church, and defendants of the same class of directors.

E. DARWIN SMITH, J. Upon the issues presented in the pleadings, and the mass of evidence taken upon this trial, the first question presented for my decision relates to the power of the court in equity to give the relief demanded in the complaint.

The mode of determining the title of a party to an office, prior to the Code, was by *quo warranto*, or by information in the nature of a *quo warranto*; and these proceedings could only be instituted and prosecuted to effect in the courts of law.

Section 428 of the Code declares that the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished, and that the remedies heretofore obtainable in those forms may be obtained by civil actions, under the provisions of that chapter.

Section 432 of the same chapter provides that an action may be brought by the Attorney-General, in the name of the people, upon his own information, or upon the complaint of any private parties, against the parties offending. "Where any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State;" and section 440 of the same chapter is as follows: "Where several persons claim to be entitled to the same office or franchise,

one action may be brought against all such persons, in order to try their respective rights to such office or franchise." These sections of the Code clearly authorize the institution of this action in the name of the people. Such action must be commenced and prosecuted like other civil actions, and is to be governed in respect to the pleadings and proceedings by the same rules. (*People* v. *Cook*, 4 *Seld.* 67. *Same* v. *Clarke*, 11 *Barb.* 337.) The Code (§ 142) requires that the complaint, in all actions, shall contain a plain and concise statement of the facts constituting the cause of action. The complaint in this case conforms to this rule, and asks appropriate relief. The relief demanded consists in, and the nature of the case requires, the exercise of the equitable power of the court. In conformity with the prayer of the complaint, an injunction has been issued and a receiver has been appointed, which are the usual and appropriate instrumentalities of a court of equity. The action is therefore properly brought. The subject matter of the controversy is clearly within the jurisdiction of the court, and the only point of any practical consequence in this connection relates to the mode of trial. Issues of fact upon *quo warranto*, issues of fact upon the relation of a party claiming an office, upon information, when the party proceeded against was in the possession of the offices, before the Code, and usually since, have been tried by a jury upon the issues made by the pleadings. The chapter of the Code in respect to actions in place of *scire facias*, *quo warranto*, and of informations in the nature of *quo warranto*, has been enacted and incorporated into the Code since the enactment of the latter in 1848, and no express provisions are made in said chapter or elsewhere, that I have been able to find, providing for the trial of such actions. Section 253 of the Code provides that issues of fact "for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground

of adultery, must be tried by a jury, unless a jury is waived; and section 254 provides that every other issue is triable by the court, which may, however, order the whole issue, or any specific question of fact involved therein, to be tried by a jury." The issues of fact, therefore, formed in this action, were in the first instance, and are, triable by the court, but the two most important and leading issues might have been submitted to a jury; and if an application had in due time been made for that purpose, it would most probably have been granted, and the court thus have been relieved of the unpleasant burden and responsibility of passing upon the facts of the case. But no application or suggestion of that kind was made to the court until the cause had proceeded to trial and the Attorney-General had opened the case, read the pleadings, and rested; when, the parties and counsel being on both sides present and not unprepared for trial, and a large number of witnesses also being in attendance, I held that the application came too late, and that the trial must proceed. It remains, therefore, for me to pass upon the issues made by the pleadings, as with other cases tried by the court.

Before proceeding to discuss the evidence applicable to the leading issues in the action, I will state such preliminary facts as I deem fully established by the evidence and undisputed.

The Albany and Susquehanna Railroad is a corporation organized in 1851 under the general railroad act of 1850, with a capital originally of $1,400,000, divided into 14,000 shares of $100 each, and subsequently increased by special act of the legislature to $4,000,000, and entitled under the fifth section of the general act to thirteen directors, to be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation.

The by-laws provided that the annual election of directors should be held on the first Tuesday of September, 1852,

and on the same day in each year thereafter, at such place as might be prescribed by a resolution of the directors the preceding year, the polls to be open at twelve o'clock at noon, and to continue open until one o'clock in the afternoon—that no transfer of stock should be made for thirty days next previous to the annual election of directors, and on the day of election the secretary should present to the inspectors of election the transfer books and an alphabetical list of the names of stockholders entitled to vote at such elections, and the number of shares held by each; and that at the election in 1852, and at each succeeding election, three persons, who are stockholders, shall be chosen by the persons entitled to vote for directors, as inspectors of the next succeeding election. It was also duly proved that a public notice of the holding of the annual election for thirteen directors of said corporation was duly published for more than thirty days before said election—the first publication being on the 3d day of August, 1869; and that said notice stated that such election would be held at the office of the company, No. 262 Broadway, in the city of Albany, on Tuesday, the 7th day of September, 1869—that the poll would open at twelve o'clock, noon, and continue open for one hour thereafter, and that the transfer books would be closed on the 7th day of August and reopened on the 8th day of September.

At the stockholders' meeting, convened in pursuance to this notice, it also appears that the inspectors of election chosen at the annual election in 1868, to conduct the election for 1869, did not qualify and act, having been restrained from so doing by injunction, and that, as the proper resource of the stockholders in that exigency, both classes of stockholders desiring to contest such election proceeded to choose inspectors for such election. It is not disputed that such was the right of the stockholders so appearing. (*See matter of Wheeler*, 2 *Abb. N. S.* 361.)

Upon the evidence on the merits, it appears that on the

day and at the place fixed for such election, the stockholders of said railroad company appeared in large numbers and chose two sets of inspectors, and held two independent elections in the same room, both proceeding at the same time; and that in proper form each set of inspectors certified to the election of a board of thirteen directors, at each poll, one class of whom I will call, for greater distinction, the Ramsey board, headed by J. Pierpont Morgan, and one the Fisk board, headed by Charles Courter and Walter S. Church; that each of these classes of men organized after such election as a board of directors of said corporation, and claimed to be lawfully elected, and to possess the right to exercise and control the franchises and property of said corporation.

The chief issues for my decision arise upon these facts, and the evidence relates to these conflicting claims; and I will proceed to discuss them in the order in which they were tried.

First. Was the election of the board called the Ramsey board of directors valid and legal, or otherwise?

The evidence, I think, clearly establishes that the inspectors—Snow, Eddy and Harder—who held this election, were chosen at a meeting of the stockholders, held in the hall of the company's office or building, organized soon, and I think from ten to fifteen minutes after twelve o'clock, at noon; that they took the oath of office prescribed by the statute regulating elections by incorporated companies—Sec. 7, of title 4, chap. 18, part 1st of the Revised Statutes—and immediately proceeded to open the polls and receive votes from the stockholders present offering the same, and received the votes of persons so voting, in person and by proxy, upon 10,742 shares of the stock of such corporation, all of which votes were given for the said class of directors, headed by the said J. Pierpont Morgan, and that they held such poll open until about half past one o'clock of the same day, and then canvassed the votes

and made and executed in proper form a certificate of election, certifying in form and effect that the said class of thirteen persons, headed by J. Pierpont Morgan, were duly elected directors of said company, and that each one of them received 10,742 votes for such office, and all the votes cast at such election.

So far as the form of the proceedings upon this election is concerned, I do not see why it was not in all respects regular and valid. The inspectors took the proper oath, and proceeded in the regular and usual way to hold said election. The treasurer presented to them an alphabetical list of the names of the stockholders entitled to vote at such election, comprising the names of all the stockholders whose names appeared upon the ledger and transfer books on the previous 7th of August, or whose stock, scrip, power of attorney or assignment for transfer had been presented to the treasurer for transfer before that day. No votes were received except from persons, or their proxies, who appeared by such list of stockholders to have been stockholders on the said 7th of August, and their names were carefully marked and checked upon such list as their ballots were received. It is true that every vote so received was challenged by some person appearing and claiming to have a proxy entitling him to vote at such election, but not by any stockholder or person holding a proxy, who did in fact vote or offer to vote at such election. The person so making the respective challenges did also demand to see the books or the transfer book of the company at the time of making such challenges. These challenges were disregarded so far as the same related to the production of the books, but reference in respect to the right to vote in each case was made to the said list of stockholders so provided by the treasurer. The party making these challenges was not entitled to a production of the books. The challenges were doubtless made in pursuance of the by-law number two of the company above set

forth, which must have been adopted prior to 1852, for the by-law section number one provides for an election to be held on the first Tuesday in September, 1852, and the printed book of by-laws, a copy of which has been furnished to me, appears to have been printed in 1853.

After that period the general railroad act was amended, in 1854. Section five of the amended act provided, "that at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it." This provision applies to the election of directors of all railroad companies organized under the general law. But if this by-law were in force it would be simply directory, and the omission to comply with it, and the disregard of the challenge, would not invalidate the elections, if otherwise valid. It would doubtless cast upon the parties claiming under it the burden of showing that the persons voting at such election, and so challenged, were or appeared by the transfer books on the 7th of August previous, to be actually stockholders in said company, and for the number of shares so voted. This was done, on the trial, by the production of the books, and the production of the ballots then deposited and preserved, and the proxies presented to the inspectors, and delivered to them at the time of such election. From the books and list of stockholders so voting, the ballots deposited, and the proxies so delivered and produced, it appears that the persons who voted at that election, in person or by proxy, were actual and lawful stockholders of said company at the time, and were legally entitled to vote at such election, with possibly an exception in respect to one or more of such voters, which, if there were no opposing votes, cannot affect the validity of the election, if it were in other respects lawfully held by said inspectors. The fact that the poll of said election was not open until after twelve o'clock, and was held open until after one o'clock, does not affect the validity of

the election. It would not have been lawful to open such election before twelve o'clock, for that was the time fixed in the notice, and no one was bound to be present before that time; but after the election was begun, it was not improper for the inspectors to keep it open as long, within a reasonable discretion, as was necessary to receive the votes of all the stockholders present, ready and offering to vote. (*See Matter of Long Island Railroad Co.*, 19 *Wend.* 37.)

The objection that the meeting of stockholders held in the hall of said office or building was called to order by Henry Smith, who was not a stockholder, is not tenable. He held a proxy given him and others to vote for one town, and, besides, he was requested by Ramsey, the president, to call such meeting to order and to act for him. This request was sufficient authority for him to act in the place of Ramsey, who was then held in custody upon an arrest by the sheriff of Albany, in an adjoining room. The call was recognized by a large number of stockholders then present. Hendrick, who acted as chairman, was a stockholder, and he was chosen by the affirmative votes of many stockholders present, no one objecting. The vote put by him on the election of the inspectors was fairly and properly put, and the inspectors duly elected by stockholders in such meeting, but few if any voting in the negative. The inspectors immediately entered upon the discharge of their duty, and many stockholders recognized them as lawful inspectors, and proceeded to vote at the poll opened by them. If nothing else appeared, this election so held by them would unquestionably be valid, and the persons voted for as directors declared by them to have been duly elected, would be the legal directors of said corporation if the meeting of stockholders at which they were so elected inspectors was a lawful meeting. And there is no ground for its impeachment presented in the evidence or seriously urged at the trial, except that a prior meeting of stockholders had been duly held in the

directors' room of said building on the same day, over which Walter S. Church presided, at which another set of inspectors had been duly elected, who had opened a prior poll and held another election, at which other directors were duly elected. And this brings me to the consideration of the second leading and important issue in the cause.

Secondly. Was the election held by Hamilton Harris and others acting as inspectors, and at which it is claimed that Charles Courter, Walter S. Church and others were elected directors, a legal and valid election?

The fact is undisputed and indisputable that a stockholders' meeting was held in what is called the directors' room of said company, by a portion of the stockholders of the corporation prior to the meeting so held in the hall of said building over which James Hendrick presided; that Walter S. Church was chairman of such meeting, and J. R. Herrick secretary; that Hamilton Harris, Joseph Bush and James Oliver were elected inspectors; that such inspectors immediately proceeded to the room called the treasurer's room in said building, assigned for the purpose of the election, and opened a poll and proceeded to receive such votes of stockholders as were offered, and continued open said poll until one o'clock P. M., when they closed the same, canvassed the votes, and declared Walter S. Church and the twelve other persons named and voted for, on said ticket, duly elected directors of said corporation. It is also clearly established and undisputed that this stockholders' meeting was called to order and organized about fifteen minutes before twelve o'clock, and that the said inspectors chosen at such meeting proceeded to the treasurer's room to open the said poll, and took possession of the polling place, and declared that they came there to act as inspectors, at about five or six minutes before twelve o'clock, and that about twelve o'clock Colonel North, who moved the organization of such stockholders' meeting, moved a reorganization of that meeting, and that said in-

spectors be reappointed and proceed with said election. Upon the question whether the said inspectors actually received any votes before twelve o'clock, there is a conflict in the evidence.

The organization of this stockholders' meeting before twelve o'clock was obviously a surprise upon many of the stockholders entitled to attend and take part in such meeting.

The notice for the election fixed the time at twelve o'clock at noon, and there was no notice given or published of a stockholders' meeting for any other time, or for any other meeting of stockholders, except such as was involved in a notice of the election. There was nothing in such notice to apprise the stockholders that there was any occasion for their assembling before twelve o'clock, or that any other business was to be transacted except that of the election. So far, therefore, as this meeting and its acts are concerned, including the appointment of inspectors, I think there can be no doubt that there was surprise and fraud upon many of the stockholders, and, as against such stockholders as did not participate in such meeting, the same was irregular and void. All acts done by portions of the corporators, which bear the appearance of trick, secresy or fraud, will be held invalid. (*Wilcox on Corporators*, 51.) Surprise and fraud upon part of the electors is ground for avoiding an election. This principle is asserted in many cases. (*Rex* v. *Gaborian*, 11 *East*, 77. *Grant on Corporations*, 204. *People* v. *Peck*, 11 *Wend.* 611. *Matter of the Pioneer Paper Co.*, 36 *How.* 108.) But it is claimed that the reorganization of the meeting at 12 o'clock cured this irregularity. This would doubtless be so if the new organization were a full, fair and open reorganization, like a new meeting, and attended with no circumstances of deception or unfairness. If the meeting held before 12 o'clock had been entirely abandoned in all respects—and it had been announced that it was so abandoned—and the

reasons for a stockholders' meeting had there been fully stated anew, and a new organization then had as of an original meeting, I should have no doubt that such new meeting would be a regular and valid one. But I think this rule will hardly apply in this case. The inspectors had gone to the treasurer's room and proclaimed themselves inspectors, and had opened the polls, and had proceeded to act as inspectors. They were not recalled. They did not abandon their places or positions, and return to the meeting for a new lease of power, or renounce their claim to be inspectors, but kept their places, assuming to be inspectors, and claiming the right to receive votes, if they did not actually receive any, before the moment of 12 o'clock arrived.

The resolutions passed at the reorganized meeting were not new resolutions prepared at the moment, but were resolutions previously prepared, and on their face assume the existence and continuance of an organized meeting and the previous appointment of inspectors. The resolutions of the new meeting are as follows:

"Resolved, That this meeting proceed with the annual election of directors and inspectors, with Walter S. Church as chairman, and Jonathan Herrick as secretary."

And next—

"Resolved, That the annual election of the directors and inspectors proceed with Messrs. Harris, Bush and Oliver, as inspectors, in the place of Messrs. Hand, Lathrop and Haskell, ineligible and removed."

It seems to me that if the case depended upon this point, I should be bound to hold that the reorganized meeting was in fact, and in legal effect, but a continuance of the first meeting. The first meeting did not break up. The chairman and secretary retained their seats at the table with their friendly stockholders, where they sat at the first meeting, and there was no abandonment of the room, or a relinquishment of its preoccupation by those who held

the first meeting, and no formal organization of a new meeting in the ordinary way.

It appears that there was a discrepancy between the time kept at the company's ticket office and in the treasurer's room, and the time of the watches of those in the stockholders' meeting in which Mr. Church presided, and at the election held by Hamilton Harris and his associate inspectors. This difference in time, I think, accounts for much of the discrepancy in the testimony of the witnesses, in respect to the order of time of particular transactions during the day. The Fisk party sent a young man by the name of Wilbur, on the morning of the election, at about 8 o'clock, to the observatory building, accompanied by Joseph Bush, to get the true observatory time; he returned and reported the time by his watch as set by some man at the observatory building, and most of the parties, including Harris, North, Sherman and others, set their watches with his, and regarded such as the true time. Harris testified that at "4 minutes before 12 by the clock in the treasurer's room, and at precisely 12 by my watch, as I had set it from the time given me by George Wilbur, we proceeded to an opening in the desk where stools had previously been arranged—three high stools—and took our station there upon the stools. I proclaimed, in substance, that we had been appointed inspectors at a stockholders' meeting held in the directors' room, and formally opened the polls. I placed my own hat on the counter in front of me to receive ballots, and the moment I had got through making the proclamation of opening the polls, Mr. Fuller stepped up on the other side of the desk, took out a package of papers and opened them, consisting of certificates of stock and a certified copy of an order appointing him receiver." These papers, Mr. Harris says, he took and examined, and as Judge Allen protested against the proceedings, he retained them until 12 o'clock precisely by the clock in the treasurer's room, when, he said, we took the

ballots—two ballots, one for 1300 shares, and one for 1200 shares—and deposited them in the hat. Lathrop testified that he was in the room, and that Harris took the first vote 5 minutes before 12; that he looked at his watch and the clock at the time, and it was 4 minutes to 12 when Harris took his seat; and that he and Haskell both noticed it at the time and spoke of it. Van Alstyne, book-keeper in the treasurer's office, says the first action there was by Hamilton Harris, who announced that he and the two others had been elected inspectors at a stockholders' meeting; that was about five minutes before 12. He commenced to receive votes about 4 minutes before 12, and before the protest of Judge Allen. Col. North had the same time with Harris. He testified that he took it from Bush and Wilbur. He moved the organization and reorganization in the directors' room. He testifies that, after the organization, the first thing that took place he marked particularly was that "I noticed my watch; I consulted it, and when it was one minute past 12 o'clock I moved two resolutions," which are the resolutions passed on the reorganization. Sherman testified that he compared his watch with Bush and with Field, and one or two other gentlemen, and that Col. North's time agreed with his. And in respect to the reorganization, he said, he "came into the directors' room from the treasurer's room about a minute before 12, and tapped Col. North on the shoulder and said: 'It is one minute of 12; keep your watch open and be sure to offer these resolutions (the second set above mentioned) at a little after 12, and not before; and in order to make sure, wait a few seconds after 12, but not more than 15 seconds.' He made some reply, and I again repeated almost exactly what I have said, to impress it upon him. He took his paper in one hand and his watch in the other, and we again compared time, and about 30 or 40 seconds to 12 I started back for the other room." And this coincides with the testimony of S. C. Hutchins.

He sat at the table to report the proceedings until after the second organization. He testified that about three minutes before 12 o'clock, by his watch, some one remarked to Col. North that it was about time for him to offer his resolutions, and he did so—the second series of resolutions; that Col. Church put the motion, and immediately it was carried, and that after the resolution was carried he said he heard the brewery bell strike 12 o'clock, and his watch agreed with that clock.

It is thus, I think, quite evident that the reorganization was moved at least three minutes before 12 o'clock by the time in the treasurer's and ticket offices of the company, which I think was more to be relied on as the true time in the city of Albany at that point of time than the time reported by Wilbur, as the observatory time, by his watch, set by a man he did not know, and by a clock he did not see, which might be done mistakenly, and possibly deceitfully—for it appears that it required a change of most of the watches of the party, whose movements were regulated by the time so reported. If it were important or essential to the decision of the case, I should be inclined to hold that the time of the clock in the offices of the company, which regulated the running of the trains, and was, as Van Alstyne testified, regulated daily by telegraphic communication with the observatory clock, should be held to be the true and proper time to regulate the proceedings of the stockholders at their corporate meetings, and should be considered as affording the true test for the determination of the actual time at the period in question, for the purpose of said election.

But the legality of this meeting, in its first organization, and its reorganization, and of the election held under its authority, was denied and contested on the trial and argument, in connection with these questions, chiefly upon the ground that it was part of a scheme or conspiracy through the form of an election, for a minority of the

stockholders of said corporation to obtain the control of said railroad by James Fisk, Jr., Jay Gould, and others acting in concert with them, and in fraud of the just rights of the stockholders holding a majority of the stock of said company. It clearly appeared that from dissatisfaction on the part of some members of the board of directors with Mr. Ramsey, or other cause, early in the summer, in conjunction with Messrs. Fisk and Gould, (Mr. Harris testified he was retained by Mr. Gould as counsel in the matter in June,) efforts began by the purchase of stock to prepare for a change in the directors in the railroad company at the coming election, to be held in September, and these efforts continued up to the 7th of August, the day for closing the transfer books.

This proceeding was entirely legitimate, proper and lawful. It is the law of joint stock corporations that a majority of the stockholders in interest shall control in the election of the officers of a company, and in its management.

Besides these efforts in the purchase of stock to get the control of the road at the ensuing election, proof was given at this trial to show that resort was had to various judicial proceedings, with the preconcerted design and intent to prevent an honest and fair election, by excluding votes that could not be controlled by the Fisk and Gould interest, and to hinder and prevent a free and true expression of the wishes of the other stockholders at such election, in respect to the future management and control of the said road.

It appears that up to the time of the commencement of this action, twenty-two different suits had been commenced and instituted by the different parties interested in this controversy. With those suits and proceedings I have nothing to do in this connection, except as they preceded, related to, or were designed to affect, influence or control the election held on the 7th of September.

The first of the suits of this description was commenced

by Joseph Bush, on or before the 3d of August, against David Groesbeck, Samuel Sloan, Samuel C. Thompson, Ossian D. Ashley, C. H. Dabney, J. P. Morgan and G. H. Morgan, Goodwin and Walter H. Burns. The complaint alleged that 3000 shares of the stock of said company had been illegally issued by Mr. Ramsey to said parties in the month of December, 1868, and prayed that said stock be declared unauthorized and void, and be given up to be canceled, and the holders thereof be restrained by injunction from parting with, assigning, or in any way incumbering the said shares of stock by them respectively held, and that a receiver of said shares be appointed. In this suit an *ex parte* order was made in this court, at a special term held in New York on the 14th of August, appointing William J. A. Fuller receiver of said 3000 shares of stock. The parties above named were required to deliver the said shares to the said receiver, upon demand, and the said receiver was directed to take immediate possession thereof.

Upon the facts stated in the complaint in this action, I do not see why this injunction was not properly issued. The facts which existed and now appear, that said 3000 shares were issued by the express authority of the board of directors, upon valid contracts, for the benefit of the corporation, and was all valid stock owned by the corporation, acquired by forfeiture for the nonpayment of calls made upon the subscriptions, were either unknown to, or were purposely suppressed by, the plaintiff.

But the order for the appointment of a receiver *ex parte* must have been granted incautiously and upon some mistaken oral representation or statement of the facts of the case, as it was in clear conflict with the law, and settled practice of this court. In *Verplanck* v. *The Mercantile Ins. Co.*, (2 *Paige*, 450,) Chancellor Walworth states the rule as follows: "By the settled practice of this court, in ordinary suits, a receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard in rela-

tion to his rights, except in those cases where he is out of the jurisdiction of the court, and cannot be found, or where for some reason it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party, to prevent the destruction or loss of property." The same rule is reasserted by the chancellor in *Sandford* v. *Sinclair*, (8 *Paige*, 374,) and in *Gibson* v. *Martin*, (*id.* 481,) and is asserted in numerous cases, among which are *Field* v. *Ripley*, (20 *How. Pr.* 26,) *McCarthy* v. *Peake*, (9 *Abb.* 166,) and *Dowling* v. *Hudson*, (14 *Beavan*, —.)

In the case of *Verplanck* v. *The Mercantile Insurance Company*, (*supra*,) the chancellor also said, that "in every case where the court is appealed to to deprive the defendant of the possession of his property without a hearing or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper, should be set forth in the bill or petition on which the application is founded."

In this case no facts are stated in the complaint calling for the immediate appointment of a receiver. It was not stated that the defendants were irresponsible, or that there was any danger of loss from the transfer of the stock; and upon the facts appearing on the trial, such allegations could not have been truly made, for the defendants are rich men, and generally of abundant responsibility to account for the stock if they had violated the injunction and transferred the scrip; and the plaintiff had not, and did not pretend to have, any title to the said stock or lien upon it, and had simply the rights of a stockholder of said company, if all the allegations in his complaint were true, to have judgment that the said scrip and stock be canceled and surrendered.

But the facts clearly show that these 3000 shares were all valid stock. It was issued by the company, as before stated, by the authority of the board of directors, and composed part of an amount of forfeited stock owned

by the corporation. By the forfeiture, the stock became the absolute property of the corporation, and might be sold at its value, and a proper stock certificate given therefor without any re-subscription. (*Otter* v. *Brevoort Petroleum Company*, 50 *Barb.* 247, 255. *State Bank of Ohio* v. *Fox*, 3 *Blatch.* 433. *City Bank of Columbus* v. *Bruce*, 17 *N. Y. Rep.* 512. *Small* v. *Herkimer Manufacturing Co.*, 2 *Comst.* 337.)

As this stock was thus clearly valid stock in the hands of the defendants enjoined in that suit, and the order for the appointment of a receiver not warranted by the facts, the prompt steps of the receiver in getting possession of this scrip, as he did from Groesbeck of 900 shares, by taking with him a sheriff's officer when he made the demand, and explaining the nature of a writ of assistance, intimating in effect that he or the officer had such writ, connected with the fact that he was at Albany on the said 7th of September, and voted on said 3000 shares at the Harris poll, without any other title to the said stock or any transfer to him on the books or of the scrip, would seem to warrant the inference that this suit was instituted for the fraudulent purpose, not only of getting possession of this scrip, and preventing the owners of it from voting upon it, against the interest of the Fisk party at the election, but also with the intent actually to vote upon it as valid stock, in opposition to the wishes of its owners, and in aid of the objects and interests of Mr. Fisk and his associates, in carrying the election of his set of directors.

The next fraudulent proceeding which seems directed to affect the election are the suits of David Wilbur, in one of which an injunction was issued restraining the defendant Ramsey from acting as president of said railroad company, which suit was followed by another suit on the next day, August 6th, in which Azro Chase was plaintiff, and the corporation and others defendants, in which an injunction was issued, and James Fisk, Jr. and Charles Courter,

upon an *ex parte* application, were appointed receivers of said railroad. In pursuance of such appointment, it appears that the said James Fisk, Jr. and Charles Courter immediately applied to the persons in possession of the office of the said railroad company in Albany, and demanded to be let into possession of said railroad as such receivers, and upon being refused such possession, attempted to take such possession by force from persons claiming to be in possession of such office and railroad, under the authority of Robert H. Pruyn, who also had been appointed a receiver of said corporation in a suit instituted in Albany county, wherein John W. Van Valkenburgh was plaintiff, and claimed to be in possession of its property as such receiver, under an order made by one of the justices of this court of the third judicial district.

The appointment of Fisk and Courter as receivers of the said railroad, and its property and franchises, is obnoxious to the same objection made to the appointment of Fuller as receiver, in the suit of *Bush* v. *Groesbeck*, and following the suits above mentioned, it seems to me must have been applied for and procured—as it was *ex parte*—in order to affect the election, by giving Messrs. Fisk and Courter the advantage of the immediate possession of the said road, and the control of its affairs, its books, papers and property.

The next judicial proceeding, which it is claimed on the argument was designed to affect the election, was the suit of Stanton Courter against the corporation and others, including Hand, Lathrop and Haskell, elected inspectors in the year 1868, for the year 1869. In this suit an injunction was issued restraining the said inspectors from acting as such at said election, on the ground that they were not stockholders of the corporation.

The summons in this suit is dated New York, September 2, 1869. The venue in the action was laid in the county of Broome, in the sixth judicial district, and the

injunction was granted by a justice of this court, of the first judicial district, doubtless without knowing or having his attention called to the fact that the place of trial of said action was in another district. The prayer of the complaint was, among other things relating to other defendants, that the said Hand, Lathrop and Haskell be restrained from acting as inspectors, or from receiving or counting any votes at said election, or at any election of officers of said company, and contained no other prayer for relief as against the said Hand, Haskell and Lathrop.

The by-laws, which required the inspectors to be stockholders of the company, had fallen into disuse, and had been disregarded by the continued election from year to year, by the stockholders, of persons not stockholders for inspectors. The same persons had been chosen for the three previous successive years as such inspectors, without dissent or objection, and I much doubt whether said by-law was ever of any force or validity, and whether the directors could thus restrict the choice of inspectors. Clearly their election was not void. The election of an unqualified person to a corporate office is merely voidable and not void. (*Kidd on Corporations*, 9. *Crawford* v. *Powell*, 2 *Burr.* 1013. *Rex* v. *Bridge*, 1 *Maule & Sel.* 76.)

It seems to me quite clear that this injunction was improvidently granted, and that the officers of a corporation cannot be thus summarily removed from office by a court of equity. But it was doubtless the duty of the said inspectors to obey the injunction, as they did. No allegation or suggestion is made in the complaint that the said Hand, Haskell and Lathrop, except that they were not stockholders, were not competent and proper persons to act as inspectors. The injunction appeared to have been signed by the judge who granted it, on the 6th of September. The use that was made of this injunction is, I think, the more serious ground of objection to it. If it had been procured and served a day or two, at least, before the time

fixed for the election, it could have done no particular injury, or created any special surprise to affect the election. It was in the possession of one of the attorneys and counsel acting for Mr. Fisk, on the evening of the 6th of September. It was talked about in the meeting held the same evening at the Delavan House, by Mr. Fisk and his friends; and one of the resolutions drawn up for adoption at the stockholders' meeting to be held the next day, stated that the inspectors had been enjoined; and the whole scheme of operations of Fisk and his party, for the next day, and the necessity for a stockholders' meeting, depended upon that fact, and the service of that injunction at the proper time, and presupposed such service. Mr. Shearman, the chief attorney for Mr. Fisk in this controversy, and the one who apparently chiefly directed the operations and movements of the Fisk party at the stockholders' meeting, and at the election afterwards, testified in respect to such service, and his movements in connection therewith, as follows:

"I set out for the offices of the Albany and Susquehanna railroad in a carriage, at about 20 minutes past 11 in the morning of that day; on my way there I saw two inspectors of election, whose names I knew then but cannot now recall, and I saw a gentleman serve them with a paper which I had given to him, and which included an injunction against their serving as inspectors on that day."

And he further said that he then went immediately to the office, and when he got into the directors' room it was about half past 11.

The procuring and keeping back this injunction, and serving it at the time and in the manner stated, was an obvious and designed surprise upon the great body of stockholders of the corporation. They had no reason to expect that said inspectors would be enjoined, and therefore had no occasion to assemble promptly to provide for the exigency created by their removal or declination to act, by the choice of new inspectors in a stockholders'

meeting. It cannot be considered otherwise than a scheme contrived and devised to take an unfair and improper advantage of the stockholders not in the interest of Mr. Fisk, in respect to the conduct of the said election. It was suggested on the argument that a primary reason for objection to these inspectors, and procuring of said injunction, was that the chairman of the board of inspectors, Mr. Hand, was one of the counsel for Mr. Ramsey. Apparently this was a good objection, for it is quite important that inspectors of such elections, where there is controversy and contest, should be impartial and disinterested men, for they act in part judicially as well as ministerially. But if it were a valid objection to Mr. Hand that he was counsel for Mr. Ramsey, I do not see why it was not equally a valid objection to Mr. Harris, who was a leading and most active counsel for Messrs. Fisk and Gould in this matter. And Mr. Bush—another inspector chosen to act with Mr. Harris—too, was deeply interested in the contest on the same side, being plaintiff in the suit instituted to procure the appointment of Mr. Fuller receiver of the 3000 shares of stock held by Groesbeck and others.

The next judicial proceeding designed to operate upon the election, as claimed by counsel on the trial, was the commencement of a suit in the name of the railroad company against Joseph H. Ramsey, Henry Smith and William L. M. Phelps, in which action an order for their arrest was obtained in the sum of $25,000.

By whose authority this suit was commenced does not distinctly appear. It was, however, commenced by the same attorneys who had commenced all the previous suits for the parties acting in concert with, or in furtherance of, the interests of Mr. Fisk. The order for their arrest was obtained on the 6th of September, and taken to Albany the same afternoon. The complaint was produced and proved on the trial, but by some mistake was not left with me; but I understand that the cause of action for which

this order of arrest was granted was, that the defendants were charged with taking and carrying away from the office of the company, certain books of the corporation. These books certainly belonged in the office of the company, and their removal could not be justified except upon the just apprehension on the part of the officers of the company that they were not safe in the office, and were there liable to be seized and taken away by force or fraud, and without right. They were in fact removed with the knowledge and assent of the president and treasurer of the company, and upon the advice of their counsel, on the evening of the 5th of August, the night before the attempt was made by Fisk and Courter to take possession of the said office, by force, as receivers.

On the morning of the 6th of August it appears that Robert H. Pruyn was put in possession of the office of said railroad, as receiver, and thereafter, (until the appointment by the Governor of Robert L. Banks, on the 13th of the same month, as executive and financial agent, to take charge of the road and operate the same,) as such receiver had the lawful custody of the books and papers of said corporation, and it appears that he was acting in concert and sympathy with Mr. Ramsey and the said officers and persons who took away the said books, and that Phelps, the treasurer retained under him, had access to the books and made entries in the same from time to time, under the direction or authority of said Pruyn. The appointment of Mr. Banks as executive and financial agent, upon the request and stipulation signed by the parties and delivered to the Governor, gave him the right to the possession and control of the said books, and virtually superseded both receivers. So that when this suit was commenced, neither of these receivers were entitled to the custody of the said books, or to bring any suit for their conversion or their non-delivery to the agents of the Governor. The books were, in fact, returned to the office on the night of the 6th

of September, and put under the control of Mr. Banks, so that when the suit was actually commenced, by the service of the summons and complaint, they were in the actual custody of the plaintiff, if the agents of the Governor properly represented the corporation. Fisk and Courter had clearly no right to bring the action as between them and Pruyn, who had been previously put in possession of the offices, under the order and authority of this court. Except for the appointment of Mr. Banks as agent of the Governor, the custody and control of these books, with all the other property of the corporation, had been assumed by this court and committed to its receiver, Mr. Pruyn, and the authority of Fisk and Courter was in abeyance, at least until the court, upon a proper application to it in the third district, had vacated the appointment of Pruyn, and directed the surrender of his trust and the transfer of the property of the corporation to Fisk and Courter. Fisk and Courter therefore had no right to institute this suit in the name of the Albany and Susquehanna Railroad Company, and the order of arrest was unauthorized. But assuming it to be otherwise, the order to hold to bail in the sum of $25,000 was most extraordinary and exorbitant, and must have been procured to be used, as it was used, on the day of election, in aid of the fraudulent purposes of Mr. Fisk and his associates. It was delivered to the sheriff of Albany at about 9 o'clock in the forenoon of the 7th of September, with instructions to do his duty, and it seems that he deemed it his duty to serve such order of arrest in person, and, as he says, at about 15 minutes before 12 o'clock—just about the time the stockholders' meeting, held in the directors' room, was called to order by Col. North. It also appears from the testimony of Mr. Ramsey, that he was detained and held in custody about half an hour, before he could get released by the execution and acceptance of a satisfactory bail bond. The arrest of Mr. Ramsey and his counsel Smith, and the treasurer,

just at this juncture, could not have occurred, under the circumstances, without particular design. The sheriff testified that he knew that the election pending was to take place at 12 o'clock; that Mr. Ramsey was prominently interested in that election; that Mr. Smith was prominently interested as counsel in the matter, and that all the defendants were well known citizens and residents of Albany.

This order of arrest, thus procured and thus executed, could have no other object or purpose on the part of those who instigated and directed it, than to hinder and embarrass Mr. Ramsey and his friends among the stockholders, and prevent them from participating in the stockholders' meeting, and possibly in the election. Some difficulty was found, as it appears, in getting bail, and if it had not chanced that able and responsible bail had been soon obtained from persons in attendance upon the election, the defendants probably would have been unable to take any part in the election.

I come to the remaining branch of the evidence tending to establish the fraudulent combination and conspiracy imputed to Mr. Fisk and his associates, in respect to the stockholders' meeting held in the directors' room; I mean the preoccupation of said room before the time fixed for the election, and by persons not stockholders of said company.

Mr. Herrick, the vice-president of the company, testifies that the superficial area of the room called the directors' room, deducting for table and desk, is 309 square feet, and that estimating three square feet for a man, the said room would hold 103 men. This estimate does not exclude chairs, and it appears that numbers were seated in chairs. It clearly appears that this room began to be filled preparatory to this meeting, at about half past 11 o'clock.

Mr. Harris testified that he went to the office of the railroad company at about half past 11, accompanied by Mr. James Fisk, Jr., Judge Parker and Mr. Field; that

they arrived there soon after half past 11, and went immediately to the directors' room, which they found about half full of men; that he recognized many persons in the room at the time they entered, and then came others he did not know.

Mr. Church testified that he arrived at the room about 21 minutes before 12 o'clock; that he went directly to the directors' room and found it partially filled with people, among them some of our lawyers and inhabitants, and other parties residing on the line of the railroad, and parties connected with the road, and named 28 persons then present whom he then recognized. It also appeared from the testimony of this witness that a meeting was held at the Delavan House the evening previous, (the 6th of September,) composed of Mr. Fisk, Mr. Field, Mr. Harris, Mr. Herrick, Mr. Leonard and Mr. Sherman, and two or three other old directors of the Susquehanna road; that the subject of a stockholders' meeting to be held the next day was discussed, and who should be inspectors and officers of said meeting was talked about, and it was understood they should meet at the directors' room the next day at half past 11.

It clearly appears that after the arrival of Mr. Fisk and his counsel and friends among the stockholders, the room rapidly filled, and that when the meeting was called to order by Col. North, at about 15 minutes before 12, it was quite full, and by 12 o'clock it was densely packed. And I think it is clearly established that of the persons so filling and occupying said room, from 50 to 60 at least were imported, came or were brought there upon the employment of James Fisk, Jr., or his agents, from the city of New York, who were not stockholders in said company; many of whom were of a rough, low class of men, such as in common parlance would doubtless be classed among the roughs and fighting men of that city. These men came together in a railroad car, and arrived in Albany

early on the morning of the 7th, and were fed and controlled, and taken to the said room, under the lead of men confessedly acting in the employ of Mr. Fisk, and many of them furnished with proxies, that they might vote, as the counsel for Mr. Fisk avowed on the trial, at all *viva voce* votes that might be taken in the meeting.

The testimony of Mr. Hendrick seems to me to give a fair representation of the actual condition of things in this room at and before the time of the meeting there held. He testified that he arrived at the said office about half past 11 o'clock; that he went first to the directors' room; that it was then full—in the eastern part overflowing. I had, he said, great difficulty in getting to the front. He was asked, "by what class of persons?" and answered, "they were strangers to me, and the hardest set of men I ever saw in my life. I should think seven-eighths of them were of that character. The room was very full. I think any sensible number of men could not be crowded into the room in addition to the number there." Of these men it appears forty-four or forty-five were fed in the restaurant, kept at the Union depot, in the northern part of the city, immediately on their arrival at Albany from New York, and their breakfasts paid for by some of the agents of Mr. Fisk. These men were then taken to another restaurant near by, kept by Joseph Clinton, to be furnished with proxies. He describes them as follows: "They were common laboring men—some of them dressed roughly, and some better. There were men in shirt sleeves, some with blue shirts and overalls. Some had their coats under their arms, and some had no coats."

Orange Stevens, a witness, called in behalf of the Fisk side of the controversy, testified that he was a passenger conductor on the Erie railroad; that he came up from New York on the same train with these men; that he gave about twenty of them proxies in a restaurant near the depot of the Susquehanna railroad. Another witness, Pol-

lard, came from New York with these men, and gave some of them proxies in the office of the railroad, and some in the restaurant. Saw them march into the room under the charge of four different persons, each having charge of a set or file of five or six of the men, and said the room was half full when they went in. The whole evidence upon this point, I think, fully establishes that this room at and about 12 o'clock was so fully packed with this description of men, with conductors on the Erie road, and other agents and retainers, employees of Mr. Fisk, or persons under his control and acting in his interest, together with other persons, comprising stockholders friendly to Mr. Fisk, and others acting in concert with him, as utterly to exclude a large portion of the stockholders attending and entitled to take part in a stockholders' meeting, at that hour, from access to said room, and preclude them from an open, free and fair and safe participation in the proceedings of such a meeting. The importation and crowding into a small room of such a class of men as I have described, and furnishing them with proxies that they might participate in the proceedings of such meeting, and in the election afterwards, was a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of the bona fide stockholders of the company—tending, if such proceedings are countenanced and allowed by the courts, to convert corporation meetings into places of disorder, lawlessness and riot; and it is doubtless due, considering the temper of the parties, to the vigilance of the Albany police, that this meeting did not end with violence and bloodshed.

Upon the whole evidence upon this branch of the case, I think I am bound to find, as matter of fact, that there was a preconceived scheme, combination or conspiracy to carry the election of directors appointed to be held at the time and place aforesaid, by the use and abuse of legal process and proceedings, and by efforts and contrivances

to prevent a fair election of inspectors at a stockholders' meeting, made necessary by the injunction against the inspectors elected in 1868, procured, used and served as above stated, with the concurring preoccupation of the room where such meeting was to be held, with such number of persons as utterly precluded a free and fair meeting for such purpose.

And I am accordingly bound to find, as matter of fact and of law, that the election held by Hamilton Harris, Joseph Bush and James Oliver, acting as inspectors, was therefore irregular, fraudulent and void.

There is still another subject for consideration in respect to this election. It was held in distinct violation and disregard of two injunctions issued out of this court and duly served upon the said inspectors. One injunction was issued in the suit of David Groesbeck and others against Jay Gould, James Fisk, Jr., and others.

This injunction required the defendants, Hand, Lathrop and Haskell, inspectors of elections, their successors, substitutes, and all and every other person who might in any way be appointed or selected, to serve as inspectors of elections, or to hold any election for directors of the Albany and Susquehanna Railroad Company, absolutely to desist and refrain, until the further order of the court, at any election on the 7th day of September, 1869, or any subsequent day, whenever the plaintiff and the other owners of 3000 shares of said company should be enjoined, or they be forbidden to vote upon the same by any injunction, or order, or judgment, or process of any court; and they were also forbidden to receive any vote, or votes, on the part of the defendants, Jay Gould, James Fisk, Jr., Charles Courter, Jacob Leonard, Samuel North, Azro Chase, David Wilbur, Alonzo Evarts, Jonathan Herrick, Joseph Bush, Hamilton Harris and James Oliver, in person or by proxy, or as the proxy or substitute in any wise of any other person, unless the plaintiff and the other holders of

said three thousand shares of stock, and of every portion thereof, should first have an opportunity to vote upon all of the said shares by them held respectively. This injunction was served upon Mr. Harris and his associate inspectors before they had received any vote, and was immediately disregarded and disobeyed in letter and intent by them, by receiving the vote of W. J. A. Fuller, who voted as receiver of the very stock upon which the plaintiffs in said action were restrained from voting. The other injunction was granted in a suit in which Minard Harder was plaintiff, wherein and whereby the said inspectors were commanded to desist and refrain from holding any election of directors, or from receiving and counting and canvassing any votes thereof. This injunction, as well as the one directed to Hand, Haskell and Lathrop, and the one forbidding Joseph H. Ramsey from acting as president of said railroad company, I think were entirely void. I do not think a court of equity has any power to restrain a public officer, or an officer duly elected or appointed by a corporation, from performing the general, ordinary and proper duties of such office. It may restrain him from doing some particular wrong or injury affecting private rights, and it may suspend or remove a director or trustee of a private corporation, upon due cause being shown and due notice given, for any gross violation of duty or corruption in office; but it cannot remove him by injunction, without notice or without a hearing. But the first mentioned injunction issued or granted in the suit of David Groesbeck and others, has been sanctioned in form and substance by the District Court of the United States in the case of *Brown* v. *The Pacific Mail Steamship Company*, (5 *Blatchford*, 525,) and, I should think, was modeled after the injunction issued in that case. It was, I think, a valid injunction, and as such it was the duty of the inspectors to whom it was addressed to obey it. The writ of injunction is doubtless liable to abuse, and is unquestionably

often granted incautiously; but while a court with equity powers exists in this State, the process of injunction is an invaluable, an indispensable instrument in its hands to enable it to discharge its proper duties, and to prevent wrongs and injustice, and it must be maintained in its integrity, and obedience to it required and enforced.

In *The People* v. *Sturtevant*, (5 *Seld.* 262,) Judge Johnson, in giving the opinion of the Court of Appeals, said that "the principle is of universal force that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. It is only when it acts without authority that its orders are regarded as nullities: they are then not voidable, but simply void."

This election would doubtless have been set aside on a summary application to this court, pursuant to section 5, of title 4, of chapter 8 of the Revised Statutes, part I, on the ground that it was held in distinct violation of this injunction; and I think in this proceeding, where the regularity of the election is in question, the fact that said election was held in violation of an injunction, must be considered.

As upon the grounds above stated, I have come to the conclusion that the election of the Courter and Church set of directors was and is not legal and valid, it follows that the priority of right depending upon the prior organization of the stockholders' meeting over which Walter S. Church presided is removed, and such meeting is to be regarded in law as if it never had been held; the consequence of which, upon the views above stated, is that the stockholders' meeting over which James Hendricks presided was the only regular, legal and valid stockholders' meeting, held on the said 7th of September; and that the inspectors elected at that meeting were lawful inspectors, and the election held by them for directors of said corporation a legal and valid election.

The argument that Harris, Bush and Oliver were officers

de facto, and the election held by them is valid upon that ground, is untenable. There can be no such officer *de facto*, as against the people, in an action at the suit of the people to try the title to the office. The doctrine in respect to officers *de facto* only applies to and in favor of third persons, and to protect innocent parties who have trusted to the apparent title of an officer. (*Ex parte Willcocks*, 7 *Cowen*, 402. *Boardman* v. *Halliday*, 10 *Paige*, 228. *The People* v. *Albertson*, 8 *How.* 363. *Weeks* v. *Ellis*, 2 *Barb.* 325.)

These views would seem to make it unnecessary for me to go further in the examination of the great mass of evidence given and received in the cause. Much of it was given and received upon the assumption that I might find it necessary to order a new election, and in that event I must determine who would be entitled to vote at such election.

But as the court in this class of questions will seek to subserve, as far as compatible with the law of the case, the interests of the corporation, and, for that purpose, will look to see how the interests of the majority of the stock are to be affected by its decision, I will proceed to state my views in regard to a few of the questions litigated and discussed in respect to this question.

It appears that at the Harris poll there were cast 13,400 votes, and at the Snow poll 10,742. Transfer the three thousand shares improperly voted upon by Fuller, from the Harris to the Snow poll, and it would give the majority to the latter poll. From the Harris vote 1100 should also be deducted, because the vote was given by commissioners who had previously been removed from office and their places filled by new officers. The certiorari brought to review the proceedings did not restore the old officers, and they had no right to cast the vote of the town. Three hundred shares should also be deducted for the town of Duanesburgh, on the ground that this court at general

term had adjudged that said town did not own any stock in said railroad corporation, and was not a stockholder. Without going further into detail on this question, I will simply state that the subscription for the 9500 shares by Hendrick, Hunt and others, I think, made them lawful stockholders upon such stock of the said corporation. They paid the ten per cent upon it, and cannot avoid the payment of the balance due upon such subscription. The company has had the ten per cent, and the subscription was made in the regular subscription book in the hands of the officers of the company, and created an absolute legal obligation to take the stock and pay for the same. (*Black River and Utica Railroad Co.* v. *Clarke*, 25 *N. Y. Rep.* 208. *Ogdensburgh Railroad Co.* v. *Wolley*, 1 *Keyes*, 120.)

The votes upon this stock would have given a great preponderance to the Ramsey set of directors on a single poll. It seems to me quite clear, then, that if there had been a single poll, and the stockholders had voted, and their votes been received according to the stock ledger and transfer books as they stood on the 7th of August, including all such entries and transfers of stock as the treasurer did make or was bound to make, and which he would have been directed by mandamus to make if he had refused, the ticket headed by J. Pierpont Morgan would have been elected by a large majority of the votes of legal and valid stock. And if on the contrary the result had been otherwise, and such result had been brought about by the reception of the votes given by Fuller and the rejection of the votes of the true owners of that stock, and the reception and rejection of other stock illegally, including the 9500 shares subscribed for by Hendrick, Hunt and others, this court would have been bound upon summary application to set aside such elections. (*Downing* v. *Potts*, 3 *Zabriskie*, 66. *Ex parte Murphy and others*, 7 *Cowen*, 153. *In the matter of Chenango Mutual Ins. Co.*, 19 *Wend.* 635.)

The defendant, Jonathan R. Herrick, was not lawfully

removed from his office of director by the common council of Albany. At the meeting of said common council it appears that but one member of the board voted for his removal, and one member voted in the negative, and the presiding officer declared the resolution carried. This was clearly an error, and said Jonathan R. Herrick remains and is a lawful director of said railroad company for the city of Albany.

Judgment must therefore be given according to these views, adjudging that the Fisk set of directors were not duly elected, and that the Ramsey set were duly elected, and are the legal and lawful directors of said corporation, and further adjudging that the people recover costs in the action, against the corporation, the Albany and Susquehanna Railroad Company; and that the complaint be dismissed as against the defendants, Jonathan R. Herrick and Walter H. Burns, without costs, and that all proceedings in the suits mentioned in the pleadings be perpetually enjoined and restrained, and that the same be discontinued by the plaintiffs on both sides, without costs, and the receiverships of Pruyn, Courter and Fisk be vacated and set aside.

The judgment will further direct that the thirteen defendants who are hereby declared to have been duly elected directors of said corporation, headed by J. Pierpont Morgan, and also the defendants, David Groesbeck, Daniel T. Chamberlain, John W. Vincent, Daniel Morrell, Dewitt C. Falls, James M. Boyd, Samuel Sloan, Samuel C. Thompson and Martin Green, recover their costs of this action against the said thirteen defendants headed by Charles Courter and Walter S. Church, whose claim to have been duly elected directors of said corporation is hereby disallowed. It will be referred to the Hon. Samuel L. Selden, of Rochester, to pass upon the accounts of the receiver; and upon a hearing of the parties at Albany, to ascertain and report to the court what would be a proper extra allowance in the

action, and to which of the defendants it should be paid, and to settle such other matters of detail as may be necessary to carry the judgment into effect.

And it will be further ordered that the said directors, so held to be duly elected, be let into immediate possession of said railroad, and that the receiver transfer to them all the property and assets in his hands belonging to said corporation, retaining from the moneys in his hands all proper allowances for fees, expenses and other charges, to be adjusted by said referee.

In conclusion, I regret that other duties forbid the devotion of greater time and reflection to the examination and decision of this most important cause. It came an exotic to this district, where the judges are full of labor and where the people have no interest in the controversy, except such interest as all good citizens feel in the welfare of the State and in the maintenance of law, order and good government. It is impossible that any judge could enter upon the trial of a cause of such magnitude, without a deep sense of oppression from the weight of the great resposibility involved in its decision. Including the time consumed in its trial and required for the examination of the case, it has occupied a month of my time, and diverted me from my particular local duties. My duty is now discharged, and a sense of relief arises from the fact that my decision is not necessarily conclusive upon the parties, and, if I have erred in judgment or opinion, the error is not irreversible.

[Monroe Special Term, November 29, 1869. *E. D. Smith*, Justice.]

SHAW vs. DAVIS.

A ministerial officer is protected in the execution of process fair on its face, issued by a court or magistrate having jurisdiction of the subject matter to which it relates.

To justify a seizure of property under execution, a constable is not required to prove the validity of the judgment on which it was issued; or indeed that any judgment in fact was rendered.

The process, formal in all respects, issued by a competent tribunal or officer authorized to act in that regard, is sufficient to protect a ministerial officer who acts under it according to law.

In an action for wrongfully taking property, the plaintiff, on the trial, made out his case by showing simply that the defendant took from him his property. The defendant then proved that he, as constable, took it under execution "A." The plaintiff then, without raising any objection to the execution, proceeded to meet this defense by showing the property to be exempt. *Held*, that this was assuming that the execution was a formal process against the plaintiff, and valid for the defendant's protection, if the property taken under it was not exempt.

And that in the absence of any suggestion on the trial, that the process was informal or invalid, the court, on appeal, would assume that there was proof of an execution against the plaintiff's property, in due form.

It has often been held that where a cause has been tried on the assumption, by the parties, that a fact existed, neither will be heard to assert its non-existence, on appeal. *Per* BOCKES, J.

Where it was proved that the plaintiff was a householder, and had a family for which he provided; that he had about thirty bushels of potatoes, four or five bushels of apples, and some sixty or seventy heads of cabbage, which comprised his stock of vegetables, and were levied on, about the middle of February; and evidence was given as to the number of his family, and as to the fact whether these vegetables were actually provided for family use; *Held* that a case was made for the jury, who had a right to find that the vegetables were all necessary, and actually provided for family use.

The law of exemption is based on just views of human generosity, and should have a liberal application to cases of unquestioned indigence.

The fact that a man is taking his vegetables to market, to exchange them for articles of prime necessity in his family, or even to obtain the means to pay his taxes, will not deprive him of his right to insist that such vegetables were in fact actually provided for family use, and exempt from seizure and sale on execution against him.

Bags are not articles of wearing apparel, nor bedding; nor do they fall within the statutory designation of articles exempt from levy and sale under execution; neither are they necessary for actual use in the preservation of articles declared by statute to be exempt.

Shaw *v.* Davis.

Where a judgment rendered in a justice's court is for different claims; or is for distinct items or articles of property, separable in their nature, and capable of being separated on the record, both as to identity and value, the county court, on appeal, may reverse in part, and affirm as to the residue.

There is no propriety in reversing a judgment in the main correct, because of the erroneous allowance of some small amount. In such a case, justice demands only a modification, and the law admits of that mode of correcting the error.

THIS was an action brought by the plaintiff against the defendant in a justice's court, for the conversion of a quantity of potatoes, cabbages, apples and bags. The defendant denied the complaint, and alleged that he was a constable of the town of Greenfield, N. Y., and as such he took the property in question by virtue of an execution against the plaintiff. The cause was tried March 6th, 1868, in the justice's court, by a jury, and the plaintiff recovered a judgment for damages and costs, $23.93. The defendant appealed to the county court of Saratoga county, where the judgment was reversed. The plaintiff then appealed to this court.

J. W. Eighmy, for the appellant. I. The defendant having omitted to raise the objection, upon the trial, that there was a lack of evidence necessary to sustain the plaintiff's case, this court will hold that the plaintiff made out a cause of action. (*Smith* v. *Hill*, 22 *Barb.* 656.)

II. The defendant failed to make out a defense. Assuming to defend the action upon the ground that he was an officer, and levied upon and sold the plaintiff's property under an execution, it was imperative upon him to show affirmatively, 1st, that he acted under an execution regular upon its face; and 2d, that the officer who issued it had jurisdiction of the plaintiff. (*High* v. *Wilson*, 2 *John.* 46. *Cleveland* v. *Rogers*, 6 *Wend.* 438. *Sheldon* v. *Van Buskirk*, 2 *Comst.* 473. *Copley* v. *Rose*, *Id.* 115. 1. The only proper way to show that he acted under an execution regular upon its face, was to introduce the execution in evidence,

(*Copley* v. *Rose*, *above cited*,) and then leave the court and jury to determine whether it was sufficient to justify him or not. 2. The only proper way to show that the officer who issued the execution had jurisdiction of the plaintiff, was to prove a judgment. 3. The evidence is insufficient to give the defendant legal authority to act. He is therefore a trespasser, and liable in this action as such. (2 *Greenl. Ev.* § 629.)

III. The plaintiff was a householder, and claimed his property as exempt. Under the statute (3 *R. S.* 5*th ed. p.* 646) he was entitled to all necessary vegetables actually provided for family use. In the case of *Carpenter* v. *Herrington*, (25 *Wend.* 370,) it was held that the statute should be liberally expounded to effect the humane object in view. In the case of *Farrell* v. *Higley*, (*Hill & Denio*, 87,) it was held that a householder was entitled to "all vegetables which may be necessary to keep his family until the next annual period for laying up such provisions;" and in the case of *Willson* v. *Ellis*, (1 *Denio*, 462,) it was held that what is necessary for a householder for the support of his family is a question of fact for the jury, and their finding cannot be disturbed. The facts proved were sufficient to bring the plaintiff under the statute, and the finding of the jury cannot be disturbed, even if the officer had legal authority to act. It may be claimed by the counsel for the defendant that the plaintiff cannot recover, having testified "that the ones he took down were not for family use, but to get groceries." This does not change the law or merits of the case. If the plaintiff had exchanged for groceries, the groceries would be exempted property. The plaintiff having no more property than the law had invested him with for the support of his family, it was his privilege to use it as he thought would serve him best. In exchanging for groceries he was only acting in a wise and prudent manner for the best interests of his family, and should be protected. If a householder chooses to exchange

his exempt property for other exempt property, the law will protect him in the act.

IV. The defendant failed to show what acts he performed to constitute the levy. The burden fell on him of showing that he made one. The defendant says, "I levied by virtue of that execution on the property in question," &c. This is all he says about making a levy. The counsel for the defendant asks the plaintiff this question: "At the time he took the potatoes, did he say he levied on the property by virtue of an execution?" The plaintiff answers, "He did not, to my recollection." The plaintiff's statement stands uncontradicted; it is all there is upon the subject; and should be regarded as if the defendant said nothing about the execution, or his right to take the property. The jury were bound to act in accordance therewith. The defendant only gives a conclusion upon what is a question of law. It is submitted that upon this evidence the finding of the jury upon the question whether a levy had been made, is conclusive. It has been held by the Supreme Court, "that in order to constitute a levy, the officer should assert his title to the goods by virtue of the execution and his acts in the assertion of his right, and the divesting of the possession, should be of such a character as would subject him to an action as a trespasser, but for the protection of the execution. They should be public, open, unequivocal, and nothing should be done by him to cast concealment over the transaction. * * * There is no hardship in compelling an officer to manifest his intention to make a levy, by acts or declarations of a clear and unequivocal character. It is calculated to prevent fraud and to protect all parties," &c. (*Beekman* v. *Lansing*, 3 *Wend.* 450. *Westervelt* v. *Pinckney*, 14 *id.* 123.) Two persons meeting upon the highway and one seizing the property of the other, without asserting his right, or manifesting by what authority he takes the same, leaving the person who has been divested of his property to resort to

an action to recover the value thereof, and learn why his property is taken, and then upon the trial the defendant only saying, I levied on the property by virtue of an execution, without showing from what court the execution was issued, or in whose favor the execution was, or for what amount, or whose property he was directed to levy upon, can hardly be such a levy under an execution as will justify an officer, when sued for taking property.

John Van Rensselaer, for the respondent. I. The cause was tried upon the theory that the property was levied on and properly taken by virtue of a proper execution in evidence, and marked "A;" and no question was made on that point, and no objection was raised on account of the execution, in any way, nor of the taking of the property under it; and it is too late here to raise an objection that no execution appears in the return of the justice. It clearly appears that an execution appeared in the cause and was marked "A," and now that the defendant cannot move to amend the return, as he might have have done in the county court, that point should not be taken. The point was not raised on the trial when it could have been obviated. (10 *How. Pr.* 330. 14 *Abb.* 75. 29 *N. Y. Rep.* 616. 30 *id.* 231.) In looking over the case, it will be perceived that the cause was tried upon the assumption of the fact that execution "A" was in evidence, and its absence from the case cannot now be insisted on as an objection. (30 *How.* 121. 10 *Bosw.* 38. 28 *N. Y. Rep.* 318. 51 *Barb.* 40.) Had the plaintiff made the point, even so late as the appeal to the county court, the defendant might have then moved to amend the return in that particular, and insert the execution if it was thought necessary; but the point was not taken even there. (*Beach* v. *Cooke*, 28 *N. Y. Rep.* 508.) The plaintiff proceeded to introduce evidence on his side, on the theory of a proper levy, by virtue of execution "A." He cannot now avail himself of the objection. (45 *Barb.*

63. 18 *How. Pr.* 331.) Where the point might have been obviated by objection on the trial, and was not, it will be considered waived by non-objection. (10 *How. Pr.* 330. 23 *Barb.* 302.) There was an execution received in evidence, and marked "A," but the printed case is imperfect in many particulars; among others in this, that the execution does not appear in the case. But there appears to be no point taken on that branch of the case, and the cause was tried, as appears by the printed case, on the theory of a proper execution, levy and sale. The point is one that was not taken at the trial, nor in the county court, and therefore cannot be taken here.

In regard to the other branch of the case, there was not sufficient evidence to prove an exemption under the statute; the verdict was not only against the weight of evidence, but against the uncontradicted evidence in the case, and the county court did not err in so finding. The principle of law that the appellate court may, and should, set aside a finding of fact by a jury, if it be plainly against the weight of evidence, is too familiar to this court for me to argue at length; upon that point I merely refer the court to two cases: *Fleming* v. *Smith*, (44 *Barb.* 554;) *Baldwin* v. *Delevan*, (2 *Hill*, 125.) And there is no doubt but the court should reverse a judgment when it is plainly against evidence; else the trial of an action and the introduction of evidence before a prejudiced jury would be a mockery.

II. The only clause of the Revised Statute under which the property in suit can be claimed as exempt, is the following: "All necessary pork, beef, fish, flour and vegetables, actually provided for family use." (3 *R. S.* 646.) There is no evidence in this case that this property was actually provided for family use, or that it was necessary. The general rule is, that all goods and chattels of the party against whom an execution has been issued, may be levied on and sold, unless they are specifically exempt therefrom

by statute. (2 *Wait's Law and Practice*, 745.) A party who claims that certain articles are exempt on the ground that they are necessary, must prove affirmatively that his claim is well founded. (44 *Barb.* 456. 1 *Denio*, 462. 32 *Barb.* 290. 14 *John.* 434.) In the case before us, the plaintiff swears "they were not provided for family use;" they were brought down to sell to pay the taxes on his farm and purchase groceries, &c. He had others at home for family use. And there is no evidence in the case that they were provided for family use, or that they were necessary for the use of his family, which must be shown affirmatively; it is not sufficient to show that they might be useful or convenient. (14 *John.* 434.) But in the case before us, he swears that those he left at home were to use in his family, and those levied on were not for family use, but to sell. It seems to me as plain as words can express it, that the jury were not justified in finding contrary to the uncontradicted evidence of the plaintiff. (32 *Barb.* 290.) Where an action is brought by a party to recover damages for taking and selling furniture which is claimed to be exempt from execution, the plaintiff must show affirmatively that the amount of property allowed by law as exempt was not left after the sale. (41 *Barb.* 417.) There is no evidence that the plaintiff had not sufficient left for family use. One claiming an exemption of his property from execution, must show the facts exempting it under the statute. (14 *Barb.* 456.) The debtor may elect which articles he will retain as exempt; this does not prevent the officer from making a levy upon all of the articles. And after this is done, the defendant is bound within a reasonable time to notify the officer which articles will be retained as exempt property. (27 *Barb.* 506. 23 *id.* 240. 2 *Wait's Law and Practice*, 751.) But in this case the plaintiff himself swears "it was not provided for family use," and the testimony is uncontradicted; thus putting it absolutely without the statute; and he made no claim to

the officer, before sale, that the property was exempt. The right to claim property exempt, is a mere personal privilege, of which no one but the debtor can avail himself. (1 *Cowen*, 114.) The plaintiff was bound to claim of the defendant his exemption. It does not appear in this case that he made any claim to the defendant that the property was exempt property. He thus waived any right he had. (27 *Barb.* 506.) The judgment in the case was for the full value of the property. The law does not exempt apples. The bags are not within any exemption, and, they being included in the judgment, it is so far erroneous. (*Id.* 506, 508.) The law presumes that a public officer has properly discharged his official duties. (19 *John.* 345. 22 *Barb.* 656. 4 *Tiffany*, 115. 2 *Wait*, 387, *and cases cited.*) And it was necessary, in this case, to sustain the judgment, to show that, 1st. The property was actually provided for family use. 2d. That it was necessary for the use of his family. 3d. That he claimed the exemption of the constable. 4th. And that sufficient was not left for family use after the levy. Although, as I have before said, the whole of the testimony of the plaintiff does not appear in the printed case, yet there is sufficient positive and uncontradicted testimony to prove that the property levied on was not exempt, and that the officer did his duty in collecting execution "A."

By the Court, Bockes, J. The point is first taken, by the plaintiff's counsel, that no judgment or execution was proved. The answer sets up a justification of the seizure and sale of the property by the defendant as constable, under an execution issued on a judgment against the plaintiff. If it be conceded that the defendant proceeded as constable under an execution against the plaintiff, issued by a justice of the peace of the county, and in all respects formal, it was sufficient for his justification, without proving the judgment on which it issued. A min-

isterial officer is protected in the execution of process fair on its face, issued by a court or magistrate having jurisdiction of the subject matter to which it relates. To justify a seizure of property under execution, a constable is not required to prove the validity of the judgment on which it issued, or indeed that any judgment in fact was rendered. (5 *Wend.* 170. 6 *id.* 367. 12 *id.* 496. 24 *id.* 485. 5 *Hill*, 440. 23 *How.* 456. 31 *Barb.* 312. 2 *Comst.* 473. 20 *Barb.* 165.) The process, formal in all respects, issued by a competent tribunal, or officer authorized to act in that regard, is sufficient to protect a ministerial officer who acts under it according to law.

The question then is, here, whether there was proof of an execution against the plaintiff in due form. As the case appears before us on this appeal, this must be assumed. The defendant testified that he was constable, and seized and sold the property under execution "A," referring to a process then produced in court. The process is not returned, but it was assumed on the trial that this process was a justification, unless the property taken was exempt from seizure and sale thereunder. No objection was made to it, either for the reason that it was not against the property of the plaintiff, or not fair on its face. But on its introduction in evidence, the plaintiff immediately proceeded with evidence to sustain his case, on the ground that the property was exempt from seizure under it. Execution "A," in court and mentioned by the witness, was evidently the execution spoken of in the answer, as an execution issued by Justice Smith on a judgment rendered by him against the plaintiff. The course of trial shows this very manifestly. The plaintiff first made his case by showing, simply, that the defendant took from him his property. The defendant then proved that he as constable took it under execution "A." The plaintiff then proceeded to meet this defense, by showing the property exempt. This was assuming that the execution was a

formal process against the plaintiff, and valid, for the defendant's protection, in case the property taken under it was not exempt. Especially must this be so regarded on appeal, no suggestion having been made on the trial that the process was informal or invalid. The case seems quite conclusive on this point. The plaintiff was watchful on the trial, and diligent in his objections to evidence whenever there was any possible question as to its propriety. So he objected when the defendant proposed to show how he came to take the property. The objection was, that the evidence was improper and immaterial, evidently because the defendant had not set up his justification in his answer. This objection compelled the defendant to ask for an amendment of his pleading. He was allowed to amend, and then averred that he took the property under execution against the plaintiff, duly issued by James V. Smith, a justice of the peace, in an action wherein Anthony Bracket was plaintiff. The defendant then proceeded with his testimony, and stated that he was constable; that "such *execution* '*A*' was issued by the officer signing it, and that he took the property under it." Now what execution was he here speaking of as "such execution 'A'?" Plainly, of an execution then present, being the one just that instant described in his amended answer; and that it was such, and admissible as evidence under the answer, is evident from the fact that the objection before urged, of impropriety and immateriality, was not persisted in, nor indeed was any objection whatever raised, and the parties then put forth their strength on the question of exemption, and the case was made to depend on that alone. In this state of the case, it seems to me that it would be unfair in the court now to hold the parties to a position other and different from that adopted by both, and fully acquiesced in on the trial. This, I think, would not be ingenuous or equitable. It has often been held that where a cause has been tried on the assumption, by

the parties, that a fact existed, neither will be heard to assert its non-existence, on appeal. Therefore, as this case stands before us, it must be assumed, as the fact undoubtedly was, that the execution "A" was the one described in the defendant's answer; and of course it afforded protection to the defendant in his action under it, unless the plaintiff established his right to the property by virtue of the statute of exemption. This question remains to be considered.

It was proved that the plaintiff was a householder, and had a family for which he provided. It was also proved that he had about thirty bushels of potatoes, about four or five bushels of apples, and some sixty or seventy heads of cabbage. These comprised his stock of vegetables. The levy was about the middle of February. Evidence was given as to the number of his family, and generally as to the fact whether these vegetables were actually provided for family use. As regards these vegetables, a case was made, in my opinion, for the jury. They had a right to find, I think, as they did, that the vegetables mentioned were all necessary and actually provided for family use. (2 *R. S.* 367, § 22, *sub.* 4.) This law of exemption is based on just views of human generosity, and should have a liberal application in cases of unquestioned indigence.

It is urged, however, that the plaintiff testified, in regard to the potatoes, that those levied on were not actually provided for family use. I do not so understand his testimony. He had stated the amount of his vegetables on hand, and the circumstances of his family; said he was taking the vegetables seized to the Springs to exchange for family groceries, and to obtain the means with which to pay his taxes. He added, the vegetables were brought down to sell; he had others at home for family use; and further, "those that I took down to sell were not for family use, but to get groceries; those I left at

home were to use in my family." He does not say that these vegetables were not originally provided for family use. He was evidently speaking of the property when seized on the way to market. He meant that then they were not for family use; but he was taking them to sell or exchange for groceries, &c. The jury had a right so to regard and construe his statement. Nor did the fact that he was taking the property to market, to exchange it for articles of prime necessity in his family, or even to obtain the means to pay his taxes, deprive him of his right to insist that those vegetables were in fact actually provided for family use, and exempt from seizure and sale under execution against him.

A man may, if he chooses, sell his exempt property, and can often in this way make it more available for family use. As regards the vegetables, I think a case was made for the jury, and it cannot be said that their verdict was in that regard unsupported by, or against, the evidence.

But the recovery included $4.50 for bags. The bags were not articles of wearing apparel, nor bedding, nor do they fall within the statutory designation of articles exempt from levy and sale under execution. Nor does it appear that they were necessary for actual use in the preservation of articles declared by statute to be exempt. The recovery for the bags was erroneous. The county court was therefore right in reversing the judgment of the justice, unless it be that the judgment might have been reversed in part, and affirmed as to the residue.

There can be no doubt as to the articles, and the amount allowed for them, for which the judgment was rendered. The proof is complete in this regard. There were eight bushels of potatoes, worth one dollar per bushel; also two and three-fourths bushels of apples, worth one dollar and twenty-five cents per bushel; also thirty heads of cabbage, worth ten cents per head; and nine bags, worth fifty cents

each. There was but one enumeration of articles, and one expression as to the value:

8 bushels of potatoes, ...	$8 00
2¾ bushels of apples, ...	3 43
30 heads of cabbage, ...	3 00
9 bags, ...	4 50
	$18 93

The verdict and judgment was for this sum. It is therefore entirely certain that there was included in the judgment the sum of $4.50 for the bags; and as to this amount, the judgment was erroneous.

The question is, then, could the county court reverse in part, and affirm as to the residue? The provision of the Code on this subject is, that the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits; and further, that "in giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact." (*Code*, § 366.) It was held in *Kasson* v. *Mills*, (8 *How.* 377,) decided in 1852, that the county court could not reverse in part when the damages were entire. In that case the damages were allowed for a single claim or cause of action, not in its nature divisible. This peculiarity of that case was noticed and commented on in *Staats* v. *Hudson R. R. Co.*, (39 *Barb.* 298.) In the last case cited, it was held that when two or three independent causes of action are prosecuted in a justice's court, and the judgment was right as to one and erroneous as to the others, which fact distinctly and plainly appeared on appeal, it was the right and duty of the county court to reverse as to the erroneous and affirm as to the legal part of the judgment. In this case there were two distinct causes of action counted on—one for killing a cow,

in January; the other for killing a bull, in October following. As to the claim for the cow, there was a perfect defense established. In *Decker* v. *Hassel* (26 *How.* 528) it was held that the whole of a justice's judgment would not be reversed for an error of the justice in allowing a small item of claim, the remaining part of the judgment being correct. In this case the court says: "We do not assume to weigh evidence, or in any manner to decide a question of fact; but whenever a separate, distinct item is erroneously allowed by a justice of the peace, there being a total failure of evidence to sustain it, and a correct judgment is given for other matters, it is the duty of the county court, on appeal, to affirm the judgment in part, and reverse it in part." It is added: "If the court fail in this duty, this court, on appeal, must give the judgment the county court ought to have given." And it is further added: "The power to give such judgment is as plainly given to the county court as language can express." In *Fields* v. *Moul* (15 *Abb.* 6) the action was, like the one in hand, against a constable for levying on and selling exempt property. The plaintiff recovered; but through the mistake of the justice, the judgment was entered for a sum exceeding the value of the property by ten dollars. In this case Judge Hogeboom gave the question here under examination very careful and elaborate examination, and settled on this principle: that when a judgment appealed from consists of distinct matters, and those matters are so presented that a final judgment may be rendered by the appellate court upon each, the judgment may be affirmed as to part, and reversed as to the residue. This subject again came under examination in the recent case of *Weed* v. *Lee*, (50 *Barb.* 354,) in which Judge Mason, speaking for the court, gave sanction to the principles laid down in the cases cited. So, too, the doctrine of these cases has received approval in the Court of Appeals, in *Brownell* v. *Winnie*, (29 *N. Y. Rep.* 400.) In this case judgment was

rendered for $17.45, whereas it should have been for $14.31; which error appeared by mathematical computation. The court, per MULLIN, J., said, "the county court had authority, under section 366 of the Code, to modify the judgment according to the justice of the case, without regard to technical errors." It was added that the general term and Court of Appeals had the same power.

These decisions, therefore, relieve the case now under consideration from all possible doubt. They settle the rule—which rule is clearly applicable to this case—that when the judgment rendered by the justice is for different claims, or is for distinct items or articles of property, separable in their nature, and capable of being separated on the record, both as to identity and value, the county court may reverse in part, and affirm as to the residue. This rule, too, commends itself to our sense of justice and right. There is no propriety in wholly reversing a judgment in the main correct, because of the erroneous allowance of some small amount. In such case justice demands only a modification, and, as above seen, the law admits of that mode of correcting the error.

In this case the jury found, on sufficient evidence, that the potatoes, apples and cabbages were exempt from seizure and sale under execution against the plaintiff. We are satisfied, too, with that finding. It was well justified by the proof. The bags were not exempt, however, and it is a matter of certainty—as much so as evidence and mathematical calculation can make it—that there was an allowance for them of $4.50. To this extent the verdict and judgment of the justice was erroneous. The county court should have reversed the judgment for this amount, only, and affirmed it as to the residue. It remains now for this court to direct the judgment which the county court should have declared.

The judgment of the county court must therefore be reversed, and the judgment of the justice also reversed as

to $4.50, and affirmed as to the residue; but without costs to either party on the appeals. This, we think, would be just in this case, as to costs. (*Code*, § 368.)

So ordered.

[SCHENECTADY GENERAL TERM, January 4, 1870. *Rosekrans*, *Potter*, *Bockes* and *James*, Justices.]

55b 404
11ap216
55b 404
48ad 10

KNOX *vs.* THE MAYOR &c. OF THE CITY OF NEW YORK.

In cases of nuisances, a complete and adequate remedy, in favor of all persons specially injured by them, can be administered in this court, unembarrassed by the technical rules prevailing upon the subject in courts of law.

Hence, an action can be maintained for the abatement of a bridge extending across a public street, as being a nuisance, and one specially affecting the plaintiff, as occupant of adjacent premises, although he does not own an estate in fee in the premises injured.

Where the evidence, in such an action, showed that the upper portion of a building, which the plaintiff had previously leased for offices, &c., had been so far injured by a bridge thrown across a public street by the defendants, in front of such building, and the obstruction to the approaches to it, caused by pedestrians passing along the walks, that they had been deserted by the tenants, and he was unable to procure others to occupy them; and that persons who passed along the street, at that point, on account of the diminished capacity of the sidewalk, by the erection of stairs to the bridge, blockaded the front of his store, rendering it inconvenient for goods to be taken to, and removed from, it, and for his customers to pass in and out, and frequently compelling the persons collected upon the walk, to go through his store, for the purpose of passing and repassing from one street to another; *Held* that these facts exhibited such a clear case of special injury to the plaintiff as would enable him to maintain an equitable action for the abatement of the structure as a public nuisance, if it could justly be declared to be such.

To constitute a public nuisance, it is necessary that it be shown to have been erected and maintained in violation of law, and that it be found to render the enjoyment of the rights obstructed by it inconvenient, unwholesome or uncomfortable.

Where a bridge, constructed across a public street in a city, was not such a structure as could, in any proper or legal sense, be pronounced an improvement promoting the convenient use and enjoyment of the street; but it im-

paired the value and usefulness of the adjacent property, and rendered it inconvenient to use it for some of the ordinary purposes of business, and deprived pedestrians of thirteen feet of sidewalk that, previous to its erection, were capable of being freely used by them, without affording or providing them any corresponding or adequate advantage for the obstacles placed in their way; *Held* that it was attended with those consequences which, in a legal sense, constitute a public as well as a private nuisance; but that whether that could be held to be its legal character, would depend entirely upon whether it was properly and lawfully placed there.

And the land upon which the street, at that point, was constructed, being shown to have been dedicated by those under whom the plaintiff claimed, for the uses and purposes of a public street; *Held* that neither the legislature nor the common council could authorize or sanction any appropriation of it, except for the purposes of a street, without obtaining the consent of, or making compensation to, the owners.

The public acquire only such an interest in land appropriated by dedication to the uses and purposes of a highway, as will entitle them to use it for that object. And subject to that right or easement, the person or persons making the dedication, and those acquiring the property under them, still retain the fee of the land.

Hence persons improperly appropriating or using a street for purposes not legitimately appertaining to it as a street, may be successfully prosecuted by the owner of the fee subject to the easement, and made to respond for the act in damages, or to surrender the property itself, as the particular case may require.

The right which the public acquire by means of the dedication and acceptance of it, is that of using the land simply as a street, and for nothing whatever beyond that; although, as incidental to that right, and as a necessary part of it, the public possess the right of rendering the street as convenient, useful, commodious, safe and wholesome, as may be, by means of improvements and regulations adapted to those ends.

Where a lease bounds the demised premises on the street, this extends the line to the centre of the street, and the lessee has a right to complain of any structure extending across the street if it imposes a new burden or servitude upon his land in the street, beyond that devoted to the use of the public, which, in substance, is that of passage merely.

Within the well settled principles of law applicable to the government and improvement of public streets, a bridge across a street in a city cannot constitute a proper exercise of the power over them that has been confided to the public authorities.

It is a permanent obstruction, in the way of the existence and enjoyment of the easement, and to that extent deprives the public of the use of that which has been dedicated and designed for their convenience and accommodation. As such it is a public nuisance, which may and should be abated and removed.

And where such a structure necessarily appropriates, for its support, land

which an individual is entitled to have maintained open and unobstructed, subject only to the right of the public to pass and repass over it, and temporarily to occupy it for the improvement and more perfect enjoyment of that right; and special injury has been occasioned to him in consequence of it; he has a right to insist upon its abatement and removal.

But he cannot recover, in an action against the city, the *damages* he has sus- reason of the injury, if he has failed to present his claim for them ..uptroller, for adjustment, as he was required to do by the statute, before commencing an action.

THIS was a suit in equity, brought by the plaintiff for the abatement and removal of an alleged public nuisance, claimed by the plaintiff to be specially injurious to himself. The alleged nuisance was a bridge across Broadway, at the junction with Fulton street, in the city of New York. The plaintiff was lessee for a term of years of certain premises situated on the corner of Broadway and Fulton streets, upon which he had erected a building at an expense of $75,000, which building was occupied in part by the plaintiff as a store, and in part it had been leased out to, and was occupied by, his under tenants.

Hamilton W. Robinson, for the plaintiff.

Andrew J. Rogers, for the defendants.

DANIELS, J. In the outset of the trial, the defendant objected that the plaintiff could not maintain this action for the abatement of the structure in controversy as a nuisance, because he did not own an estate in fee in the premises affected by it, and authorities were produced showing that such was the rule which prevailed in courts of law upon this subject. Under that rule the plaintiff's remedy at law, as a tenant merely, would be that of a special action on the case, as it was called before the Code, for the recovery of damages. And such actions could be brought if the plaintiff should prove to be entitled to maintain them, from time to time, as the damages he might sustain

would justify a resort to them during the continuance of the cause producing them. Under that rule he would be bound to submit to the continuance of the wrong for such time as his interest in the leasehold premises continued, if the public authorities should maintain it as long as that.

The only other remedy open to him, would be that enjoyed by him, in common with every other member of the community, of indicting the defendant for a misdemeanor committed by the act of erecting and maintaining a common nuisance, and that would be subject to embarrassments and obstacles that it is not now necessary to enumerate. It is sufficient to say that he was not bound to resort to that proceeding, even if the structure in controversy could be clearly established to constitute a common nuisance. The fact that he could, as a tenant of the premises which it is complained are injured, maintain only actions at law for damages, and that such actions would have to be from time to time repeated, as the damages might continue to accrue, without resulting in the removal of the structure itself, is sufficient to entitle the plaintiff to bring his action in this court as a court of equity. It is so, for three reasons: *First*, that he has no adequate remedy at law; *second*, to prevent a multiplicity of actions; and, *third*, to prevent irreparable injury by the continuance of the nuisance itself. (2 *Story's Eq. Jur.* § 924. *Spencer* v. *London and Birmingham Railroad Co.*, 8 *Simons*, 193. *Sampson* v. *Smith*, *Id.* 272. *Ripon* v. *Hobart*, 3 *Mylne & Keen*, 169. *Catlin* v. *Valentine*, 9 *Paige*, 575.)

A complete and adequate remedy in cases of nuisances, in favor of all persons specially injured by them, when they are of a public nature, can be administered in this court unembarrassed by the technical rules prevailing upon the subject in courts of law. And if the complaint made by the plaintiff shall prove to be well founded, he has presented such a case as, for the reasons already mentioned,

may be properly redressed by this court as a court of equity.

The structure which the plaintiff in this action alleges has been erected, and is now maintained by the defendant in violation of his rights as tenant and occupant of the premises mentioned, is a bridge elevated at the height of eighteen feet over the junction of Fulton street and Broadway. This bridge is reached by stairs provided for that purpose at each of its corners, resting upon the sidewalks on Broadway. They extend to such a distance along the sidewalks, from the sides of the top of the bridge, as to afford proper means of ascending to, and descending from the bridge itself. In front of the plaintiff's store the sidewalk is thirteen feet in width, and the stairs to the bridge have been so constructed as to occupy just one half of this space. The northeasterly stairs ascend from the walk to the bridge across a considerable portion of the front of the store occupied by the plaintiff, obstructing the free passage of the light into the store, and rendering the rear portion of it so dark as to require the gas to be lighted, for a part of the day at least, in order to enable the plaintiff to carry on and transact his business. The evidence also quite satisfactorily showed that the upper portion of the building, which the plaintiff had previously leased for offices and other similar purposes, had been so far injured by this bridge being in front of them, and the obstruction to the approaches to it caused by pedestrians passing along the walks, that they had been deserted by the tenants, and he was unable to procure others to occupy them. And in addition to that, the persons who passed along the streets at this point, on account of the diminished capacity of the sidewalk by the erection of the stairs to the bridge, blockaded the front of his store, rendering it inconvenient for goods to be taken to and removed from it, and for his customers to pass in and out, and frequently driving the persons collected upon the walk, through the inside of

his store, for the purpose of passing and repassing between Broadway and Fulton street.

No reason exists, under the evidence, given for doubting the truth of these statements. And assuming them to be true, as the court is bound to do, even though they may be somewhat colored, they exhibit such a clear case of special injury to the plaintiff as will enable him to maintain the present action, if the structure complained of can justly be declared to be a public nuisance. To constitute such a nuisance it is necessary that it shall be shown to have been erected and maintained in violation of law, and that it shall be found to render the enjoyment of the rights obstructed by it inconvenient, unwholesome or uncomfortable. On account of the large amount of travel upon the streets and on the walks at this point, the former frequently became so completely obstructed and blockaded by vehicles as to render it impossible, for the time being, for pedestrians to effect a crossing; and when that was not the case, crossing these streets by persons on foot was frequently difficult as well as dangerous. It was to relieve pedestrians from these interruptions and dangers that the defendant erected and has since maintained this bridge. When the streets have been very wet and muddy, and in the winter season when the melting snow or ice has rendered a passage over them troublesome and difficult, then the evidence shows that this bridge has been used, but even then, not to such an extent as to justify the conclusion that it has afforded any great or substantial relief to the walks themselves, or the persons using them. Even at those periods the bridge does not appear to be used to such an extent as to accommodate a number of people equal to that which the stairs obstruct, by contracting and reducing the capacity of the walk. During the ordinary weather which prevails, a much smaller proportion of people make use of it, and for much of the time, its chief purpose seems to be that of affording convenient accom-

modations for persons desirous of observing the movements upon the streets.

The obstacles interposed by the stairs themselves to the free and unobstructed use of the sidewalks, at all times, are much greater than the convenience and facilities afforded to persons using them by the bridge. The latter, therefore, constitutes a positive obstruction to those who are entitled to the enjoyment and use of the sidewalks at this part of the city, instead of adding to or promoting their convenience. And such appears to be the manner in which it is commonly regarded, for pedestrians seem to prefer encountering the delay, difficulty and danger of crossing upon the surface of the streets themselves, to the performance of the labor required to make a combined ascent and descent of thirty-six feet, for the purpose of securing freedom from these obstacles by crossing over the bridge. Of the two, the journey over the bridge, in the judgment of those using the walks, appears to be regarded as the most difficult to be made.

For these reasons, the bridge is not such a structure as can, in any proper or legal sense, be pronounced an improvement promoting the convenient use and enjoyment of the streets. It not only impairs the value and usefulness of the adjacent property, but beyond that, it renders it exceedingly inconvenient to use it for some of the ordinary purposes of business, and deprives pedestrians of thirteen feet of sidewalk that previous to its erection was capable of being freely used by them, without affording or providing them any corresponding or adequate advantage for the obstacles placed in their way. It is attended with those consequences, therefore, which, in a legal sense, constitute a public as well as a private nuisance. But whether that can be held to be its legal character, will depend entirely upon whether it was properly and lawfully placed there.

The land upon which Broadway, at this point, has been

constructed, was shown upon the trial to have been dedicated, by those under whom the plaintiff has derived his estate, for the uses and purposes of a public street. In this respect it differs from many of the streets of the city where the fee of the land was in the public at large, and by legislation was afterwards transferred to the city, and also from those streets to which the city acquired title in fee by proceedings taken for opening them. In these cases the streets may be devoted to many public purposes that would be entirely unwarrantable and unjustifiable, where a simple dedication of the land for the purposes of a street was all that had taken place. Hence, in the former, the legislature of the State may authorize the construction of railways over the streets, without the consent of, and without compensation to, the adjacent owners of property. (*The People* v. *Kerr*, 27 *N. Y. Rep.* 188.) While in the latter case, neither the legislature nor the common council of the city, can authorize or sanction such an appropriation of the street, without obtaining the consent of, or making compensation to, such owners. (*Williams* v. *N. Y. Central Railroad Co.*, 16 *N. Y. Rep.* 97.) In this case it was held that the legislature had no such authority over the public streets of a city, as would permit it to authorize such a use of them. This authority also holds, that the public acquire only such an interest in land appropriated by dedication to the uses and purposes of a highway, as will entitle them to use it for that object. And subject to that right, which is denominated an easement, the person or persons making the dedication, and those acquiring the property under them, still retain the fee of the land.

For this reason, persons improperly appropriating or using the street for purposes not legitimately appertaining to it as a street, may be successfully prosecuted by the owner of the fee subject to the easement, and made to respond for the act in damages, or to surrender the property itself, as the particular case may require. The right

which the public acquire by means of the dedication and the acceptance of it, is that of using the land simply as a street, and for nothing whatever beyond that. Incidental to this, and as a necessary part of it, the public possess the right of rendering the street as convenient, useful, commodious, safe and wholesome, as it can be by means of such improvements and regulations as experience has discovered to be adapted to those ends. To accomplish those results it may be graded, curbed, paved and sewered, and provided with the requisite gas and water pipes to light and clean it; and the manner in which excavations may be made or maintained in or under it, may be suitably and safely controlled by the public authorities having charge of the easement for the benefit of the public. But all this is done and permitted for one end and purpose, and that is, to render the streets as convenient, safe, useful and wholesome as they may be, for those having occasion to use them for the purpose of passing over them. Many other improvements in this respect may, and undoubtedly will, be discovered and made to increase the safety and facilities of the public in the use of the streets, but it may very well be questioned whether experiments like the one in controversy will be found to have sufficient tendency in that direction to justify a repetition of it.

Beyond this right of improving and regulating the manner in which the streets may be used, where the public have acquired only the easement secured by the dedication, the public have no right to make use of the land over which the streets may be lawfully maintained and preserved. It was claimed, upon the trial, that the provisions in the early charters conferred upon this city, would authorize a more unrestricted use than that of the land devoted to the purposes of a street. But even if these statutes were themselves capable of being so construed, which certainly would admit of very great doubt indeed, such a construction could not be sanctioned at the time

when this bridge was erected, for the constitution of this State had long before that intervened with its potent injunctions that no person should be deprived of his property without due process of law, and that private property should only be taken for public purposes by properly and justly compensating the owner for it. (*Constitution of* 1822, *art.* 7, §§ 1, 7. 1 *R. S.* 44, 45, *5th ed.*) And these provisions have been prominently placed in the constitutions formed in this State since that time. The interest which the owners of the fee had in the land dedicated to the use of the street was property, in the legal as well as popular signification of that term, recognized and protected as such, the same as the other property of the owner, by the laws of this State, and therefore within these constitutional provisions. And even if the statutes previously existing within the city were of themselves so comprehensive as to allow the owner to be deprived of it without compensation and without due process of law, as long as the right secured by them was not resorted to, or in any manner rendered available, until after these constitutional limitations had prohibited that from being done, they will not and cannot in any manner impair the rights of the owner in this respect. Those rights are now, and were when this bridge was erected, within the restrictions imposed upon the public authorities by these salutary provisions of the constitution. And it was not, therefore, within the power of the common council, or of the legislature, or both combined, to deprive the defendant of them, unless the measures for doing so were taken in conformity to its requirements. Those measures only could be effectual in this respect which would provide compensation for the property taken, or would result in the assent of the person entitled to its enjoyment.

Without one or the other, the act of appropriating the property in question would necessarily be illegal and unjustifiable, if it has imposed an additional easement or

burden upon the property beyond that included in the dedication. If that be its character, the provisions of the act of 1866, authorizing a certain amount to be raised by taxation for the purpose of paying for the erection of the bridge, would not deprive the plaintiff of any of his rights for redress on account of it. (*Laws of* 1866, *p.* 2060.) An act of the legislature is not of itself due process of law, within the contemplation and meaning of the constitution. And this act provided no compensation for the owner whose property has been rendered subservient to the maintenance of this structure.

An attempt was made, on the part of the defendant, to show that the present plaintiff consented to the erection of this bridge, but no evidence was given which warranted that conclusion as a matter of fact. The right of the owner of this corner to the fee of the land in the street, subject to the easement of the public, has been acquired by the plaintiff by virtue of the lease executed and delivered to him. That bounds the land leased on the street, which, by a well settled rule of construction, extended the line to the center of the street. (*Bissell* v. *N. Y. Central Railroad Co.*, 23 *N. Y. Rep.* 61. *Perrin* v. *Same*, 36 *id.* 120.) The plaintiff, therefore, is legally entitled to complain of this, if it has imposed a new burden or servitude upon his land in the street, beyond that devoted to the use of the public, which in substance was one of passage, merely.

This bridge is a structure permanently erected over the streets, appropriating for its support, and the avenues to it, thirteen feet, in the aggregate, of that part of the street which had been devoted to the use and convenience of pedestrians. It was not done for the purpose of improving the easement upon and over the land itself, which the public were and are entitled to enjoy; and it has no tendency whatever to produce any such improvement, but for the purpose of creating a new and distinct servitude, above the streets and above the land upon which the public ease-

ment was created. The fact that a portion of the street has been exclusively devoted to the support of this structure, is sufficient to show that it can be no development or improvement of the pre-existing easement, for that actually deprives the public of the use of so much of the easement itself as the bridge requires for its own support. If the appropriation of a portion of the street or sidewalks can be justified for this purpose, it may also be for the support of any other device that can be made useful in transferring persons from one side to the other side of a blockaded or crowded street. If the object in view is sufficient to justify the exercise of the power, it may be used in any manner that either ingenuity or fancy may suggest. And if a bridge is found to fail in fulfilling the expectation in this respect of those who designed and erected it, hoisting apparatus, with cranes and engines for its use, may be substituted in its place. And this may be done not only where the streets are liable to become blockaded and dangerous, but whenever that condition may be reasonably apprehended. If this may be done, nothing would appear to be in the way of a raised walk, not only across, but along the streets themselves. The power over the streets that will authorize and sanction one, will permit the existence of the others. If it could be sustained, it is capable of being used in such a manner as not only to seriously impede and impair the public utility of streets as avenues for travel, but beyond that, it would be in danger of rendering them not only annoying, but useless to those who should endeavor to carry on business upon them.

Within the well settled principles of law applicable to the government and improvement of public streets, no such erection as the one complained of can constitute a proper exercise of the power over them that has been confided to the public authorities. It is so entirely unadapted

to the improvement or enjoyment of the street, as to be incapable of promoting the utility of the easement which the public have in it, in any respect whatever. On the contrary, it is a permanent obstruction, in the way of existence and enjoyment of the easement, and to that extent deprives the public of the use of that which has been dedicated and designed for their convenience and accommodation. As such it is a public nuisance, which may be and should be abated and removed. (*People* v. *Cunningham*, 1 *Denio*, 524. *People* v. *Vanderbilt*, 28 *N. Y. Rep.* 396.)

And as the structure has necessarily appropriated for its support the land which the plaintiff is entitled to have maintained open and unobstructed, subject only to the right of the public to pass and repass over it, and temporarily to occupy it for the improvement and more perfect enjoyment of that right, and special injury has been occasioned to him in consequence of it, he has made out and sustained his right to insist upon such abatement and removal. He cannot, however, recover in this action the damages he has sustained by reason of such injury, because he did not present his claim for them to the comptroller for adjustment, as he was required to do by the statute, before he commenced the action. (*Laws of* 1860, *p.* 645, § 2.)

If the action had been for their recovery alone, it would have been plainly within the language of this statute. The fact that further relief of an equitable nature has been also demanded, cannot have the effect of excluding from the operation of the statute that which would otherwise have been so plainly within it.

The plaintiff must have judgment directing the removal or abatement of this bridge as a nuisance, within ninety days after service, upon the proper officer of the defendant, of a certified copy of the judgment, without prejudice to the plaintiff's right to maintain an action at law for the

recovery of the damages sustained by him. As both parties have succeeded in part, neither is entitled to recover costs as against the other

[NEW YORK SPECIAL TERM, June 1, 1868. *Daniels*, Justice.]

NELSON ROWE *vs.* CYRENE SMITH.

Where a married woman is sued for a damage done to the plaintiff's land and crops by her cattle, horses, &c., her husband need not be joined as a party defendant. BALCOM, P. J., dissented.

APPEAL from a judgment of the county court of Cortland county.

The action was commenced in a justice's court, to recover for damage done to the plaintiff's land and crops by the defendant's cattle, horses and hogs. The plaintiff recovered a judgment for $20 in the justice's court, and on appeal to the county court, the same was affirmed. The defendant appealed from the judgment of the latter court.

Hoyt & Smith, for the appellant.

Ballard & Warren, for the respondent.

BOARDMAN, J. It is conceded that the cattle, horses and hogs of the defendant passed from her land upon the plaintiff's land, the fences between the two farms having been before that removed, and that damage was done to the plaintiff's land and crops. Upon such a state of facts there can be no doubt that the defendant is liable, unless the legal objections urged by the defendant on this appeal

are well founded. Because the defendant is a married woman, it is insisted the action cannot be maintained without joining her husband as a party. If we are governed by the Code, as it was amended in 1857, (§ 114,) and has since stood, the wife could not be sued alone, except by her husband.

The husband must be joined, except where she sues in respect to her separate property, or where the action is between husband and wife.

By the act of 1860, as amended by the act of 1862, (*Laws of* 1862, *p.* 343, *&c.*,) "any married woman may sue or *be sued* in all matters having *relation to* her sole and separate property * * * in the same manner as if she were sole." "In an action brought or defended by any married woman in her name, her husband shall not—neither shall his property—be liable for the costs thereof, nor the recovery therein." "A married woman may be sued in any of the courts of this State, and when any judgment shall be recovered against any married woman, the same may be enforced by excution against her sole and separate property in the same manner as if she were sole." The act of 1862 certainly modifies the Code, (§ 114,) and in its letter authorizes the making of a married woman sole defendant in all matters touching her separate estate or arising therefrom.

Nor is there any reason, founded on principle or authority, by which actions *ex delicto*, as well as actions *ex contractu*, are not embraced in the above provisions.

The cases cited by the appellant are of torts of a personal character, such as assault and battery, libel, slander, and for penalties in nowise affecting or arising from the separate estate of a married woman, and should be carefully distinguished from the class of torts frequently arising out of the ordinary conduct of business, such as negligence, trespass on land, trover, replevin, fraud, &c. The former are the personal acts of the wife, for which the husband

is held responsible, upon the theory that he has the power to control the conduct of his wife.

But when the wife is allowed to conduct business independent of her husband, it would be very unjust that he should be held responsible for all her errors of omission or commission, and the law does not require it. A careful examination of the cases cited by the appellant will show nothing in conflict with this distinction, and the following cases support the rule I have laid down: *Porter* v. *Mount*, (45 *Barb.* 425;) *Klen* v. *Gibney*, (24 *How.* 31;) *Morrell* v. *Cawley*, (17 *Abb.* 76;) *Code*, §§ 118, 119.

By the act of 1860, property acquired by the labor of a married woman belongs to her; and this stock which committed this trespass was bought out of such earnings.

There is nothing in the return showing whether such earnings were before or after 1860, and in such cases every presumption is in favor of the judgment, and that the property was her. (*Bishop* v. *Main*, 17 *How.* 162.) Even if this were not so, the defendant would still be responsible for trespass committed by cattle in her possession and under her control. (*Tonawanda Railroad Co.* v. *Munger*, 5 *Denio*, 255.) I cannot see how the evidence relating to the lane or highway, and the division fence, can operate as a ground for reversing this judgment, since there is no attempt to show that the plaintiff removed any portion of the fence which he was bound to maintain. (*Colden* v. *Eldred*, 15 *John.* 220.)

As a question of fact, that has been settled by the justice against the defendant, and there is nothing in the return from which we can say that such conclusion was wrong. All the inquiries as to the location of the division fence, or the existence of a highway, were wholly immaterial.

There is nothing in the other exceptions which calls for particular notice.

There were no fatal errors committed on the trial before

the justice, and the judgment of the justice, and of the county court, should therefore be affirmed, with costs.

PARKER, J., concurred.

BALCOM, P. J., (dissenting.) This was an action for trespasses committed on the plaintiff's land by the defendant's cattle. One defense was, that the defendant was a married woman, and that her husband, who was living with her, should have been joined with her as a defendant in the action.

The action was brought before a justice of the peace, where the plaintiff recovered a judgment against the defendant, personally, for $20 damages, besides costs. The defendant appealed to the Cortland county court, where the judgment against her was affirmed, with costs. The defendant appealed from the judgment of the Cortland county court to this court.

The cause was first argued at the July term of this court in 1868; the court being equally divided in opinion, a reargument was ordered at the November general term of this court in 1868. The cause was again argued at the January term of this court in 1869, and was decided at the May general term, 1869, by BOARDMAN, PARKER and BALCOM, justices. Justice Murray was then sitting as a member of the Court of Appeals.

It is provided by section 114 of the Code, "when a married woman is a party, her husband must be joined with her, except that, 1. When the action concerns her separate property, she may sue alone." The second subdivision of that section relates to actions between husband and wife, and need not be considered.

There can be no doubt that it is necessary for the plaintiff to join the husband as a defendant with the wife in an action like this, unless the old rule was changed by the legislature in 1860 or 1862. (*See Coon* v. *Brook*, 21 *Barb.*

546; *Horton* v. *Payne*, 27 *How. Pr. R.* 374, *and cases there cited.*) *Horton* v. *Payne* was affirmed at a general term of this court.

This action *concerned* the damage the defendant's cattle did upon the plaintiff's land. It did not concern the separate estate of the defendant, within the meaning of section 114 of the Code. The action was *ex delicto*, for a tort. The law always was, prior to 1860, that the husband was jointly liable with the wife for her torts. If the cattle of the wife escape and do damage upon the land of another, it is her tort, for which her husband is jointly liable with her, unless he is relieved from such liability by the laws of 1860 or 1862.

According to section 7 of chapter 90 of the laws of 1860, (*Laws of* 1860, *p.* 158,) "any married woman may, while married, sue and be sued in all matters having relation to her property." The same or similar language was retained when that section was amended in 1862. (*Laws of* 1862, *p.* 344.)

It is provided by chapter 172 of the laws of 1862, (*Laws of* 1862, *p.* 343,) "In an action brought or defended by any married woman *in her name*, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein." (*Id.* § 5.) "A married woman may be sued in any of the courts in this State, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she were sole." (*Id.* § 7.)

I think this language is insufficient to relieve the husband from his common law liability for the torts of his wife. It only exempts him from liability for damages or costs in actions to which his wife is a party, when he is not also a party. The legislature must take another step in order to relieve the husband from liability for the torts of his wife, whether she commits them with her own

hands, or by allowing her cattle to go upon the land of another.

But it is said this action was a "matter having relation to the sole and separate property" of the defendant, and that therefore she was properly sued, the same as if she had been sole. (*Laws of* 1862, *p.* 344, § 7.) The action did not, and could not, affect the defendant's right or title to the cattle that did the damage upon the plaintiff's land; nor did it affect her possession, or the right to the possession, of such cattle; and I am of the opinion she was not sued in a "matter having relation to her sole and separate property," within the meaning of the act of 1860 as amended in 1862. (*Laws of* 1862, *p.* 344, § 7.)

For these reasons, I am of the opinion the judgment of the county court, and that of the justice of the peace in the action, should be reversed, with costs.

Judgment affirmed.

[BROOME GENERAL TERM, July 20, 1869. *Balcom*, *Boardman* and *Parker*, Justices.

SCHERMERHORN *vs.* BURGESS and others.

Where a revenue stamp is omitted or left off a promissory note, at the time the note is made and delivered, by mistake, and without any intent to evade the revenue act, the instrument is not, by reason of such omission, invalid in its inception.

No stamp is necessary upon such a note, either for the purpose of its being used as evidence upon the trial, or otherwise, where the referee finds as a fact that the stamp was omitted without any intent to defraud the government.

There can be no presumption of any fraudulent intent, against such a finding of fact.

When an application to the collector, to have a stamp affixed to an instrument is not made by the makers of the instrument, but by another party having an interest therein, as the payee or holder of a note, or the like, the proper district in which the application is to be made is the district in which the party making it resides, and where the instrument is then held.

The provision of the act of congress, declaring that where a party has not affixed a revenue stamp to an instrument, at the time of making or issuing the same, "and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, *he or they* shall appear before the collector," &c., clearly refers to the party or parties "desirous of affixing such stamp," whether the maker or the party having an interest, other than the maker. *He or they* may appear and have the stamp affixed, by complying with the conditions.

APPEAL from a judgment entered upon the report of a referee.

The action was against the makers and indorsers of a promissory note for $3000, made by Charles Burgess and C. P. Burgess, and indorsed by W. J. Moses and E. Sheldon. The makers appeared and put in answers, setting up a defense in no way connected with the question of stamps upon the note, and on the trial abandoned the defense which they had set up in their answer. The indorsers answered separately, claiming that the note had been altered in its date, since it was indorsed, whereby they were discharged.

On the production of the note before the referee, on the trial, it was stamped with the requisite amount of United States internal revenue stamps canceled; but it appeared in evidence that they were placed thereon by direction of the plaintiff, and not of the defendants. The plaintiff, who resides in the 23d collection district, then procured the note to be properly stamped by the collector, and the penalty remitted, on proof being furnished that stamps were left off inadvertently. The note was then offered in evidence, and received with the indorsements of the collector. The makers applied for leave to amend their answer, so as to set up the defense that the note was not stamped, when issued. This was objected to by the plaintiff, but allowed by the referee. The defendants were sworn as witnesses, but made no claim that the stamps were omitted with a fraudulent intent.

The referee found as a fact that the stamps were not omitted with any intent to defraud the government, or

evade the provisions of the law; and reported in favor of the plaintiff, against the makers, for the full amount of the note, and as to the indorsers, dismissed the complaint, with costs.

The makers appealed.

Geo. F. Danforth, for the appellants.

A. P. Smith, for the respondent.

By the Court, JOHNSON, J. There is no merit in this appeal. The referee has found as a fact that the revenue stamp was not omitted or left off the note in question at the time it was made and delivered, with any intent to evade the provisions of the act of congress on that subject. It was not therefore invalid in its inception, by the very terms of the act of congress. (*Sess. Laws of* 39*th Congress*, 148, *Sched. A*, *amending* § 158 *of act of June* 13, 1864.) The same provision was also contained in the act of 1864. (*Beebe* v. *Hutton*, 47 *Barb.* 187. *Vorebeck* v. *Roe*, 50 *id.* 302.) I confess I do not see that any stamp was necessary upon the note in question, either for the purpose of its being used as evidence upon the trial or otherwise, in view of the express finding of the referee on the subject of the intention of the parties when the note was made and delivered. There can be no presumption of any fraudulent intent against the finding of fact. The note was not "invalid and of no effect," as it is not made so by the act, upon the facts found. It must have been, therefore, valid and effectual. As I understand the several acts of congress, it is nowhere provided that an instrument, which is not void, shall not be used in evidence by reason of its having no stamp upon it. A different view of this question seems to have been taken, however, by the court in *Beebe* v. *Hutton*, (*supra.*) The court in that case seems to have been of the opinion that even where an instrument

was not invalid by reason of the omission to place the revenue stamp upon it, when executed, it was necessary that one should be affixed to it to render it competent evidence upon the trial. I do not concur in this view, but it is unnecessary to pass upon the question in this case. Here the revenue stamp had been affixed by the collector of internal revenue, and the proper indorsement made by him according to the act of congress when the stamp has been affixed by such officer, after the instrument has been made.

The objection taken to this by the defendants' counsel is that the stamp was not affixed by the proper collector.

The makers of the note, it appears, resided at the time of the making thereof, and still reside in the 24th collection district of the State, while the plaintiff, who procured the stamp to be affixed, resided in the 23d collection district, and still resides there. The stamp was affixed and the indorsement made by the collector of the district in which the plaintiff resided. The point taken is that the application should have been made to the collector of the district in which the makers resided and where the note was made and delivered.

The act of congress before referred to, provides that where the stamp has been omitted, at the time of making any instrument, the party making it, "or any party having an interest therein," may within a certain time apply to the collector "of the proper district," and have the stamp affixed upon the conditions prescribed. It is not declared which district is the proper one. That is left to inference and construction.

I am clearly of the opinion that when the application is not made by the makers of the instrument, but by another party having an interest therein, as payee, or holder of a note, or the like, the proper district in which the application is to be made, is in the district in which the party making it resides, and where the instrument is then held.

It seems to me the collector of such district is the only one who has jurisdiction of the person applying, and of the instrument in his hands. If this view is correct there is no valid objection to the note, either as matter of evidence or as a valid instrument.

I am aware that it was held in *Myers* v. *Smith*, (48 *Barb.* 614,) that the only proper person to appear before the collector and make the application to have the stamp affixed, where it has been omitted at the time the instrument was made, was the maker of the instrument; and that where another person interested in such instrument desired to have the stamp affixed, he must procure the maker to appear before the collector and apply for and procure such stamping, or the stamp would be of no effect.

I do not so read the act. The language of the provision seems to me very plain, and to mean and express just the reverse of this interpretation. The provision is that where the party has not affixed the stamp at the time of making or issuing the instrument, "and he or they or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, *he or they* shall appear before the collector," &c.

This clearly refers to the party or parties "desirous of affixing such stamp," whether the maker or the party having an interest other than the maker; *he or they* may appear and have the stamp affixed, by complying with the conditions. The maker might not be desirous of having it affixed, whether the stamp was omitted for the purpose of defrauding the revenue or by accident, mistake or inadvertence. He might prefer to subject himself to the penalty rather than have the instrument validated by the proper stamp. Hence it was highly proper to provide that any party interested in having the interest or obligation rendered *prima facie* valid, as well as valid in fact, and in law, and "desirous of affixing the stamp," might appear and procure such stamp to be affixed.

This is the fair grammatical construction of the sentence. The antecedent of "he or they," who may appear, is any party previously specified in the sentence who may be desirous of affixing the stamp for any reason. This interpretation is consistent with justice, and fairness to both parties, to an instrument, and I cannot doubt it was what was intended by the act.

The other construction puts it in the power of one party to a note, or other instrument, to practice the greatest injustice against the other, and defeat at will the most equitable and meritorious obligation.

I do not think we should give a construction which must be productive of such consequences to the acts of any legislative body, where it is fairly susceptible of one quite the reverse. We cannot presume that congress intended to favor the breaking of contracts and non-fulfillment of the pecuniary obligations by the maker with impunity, as a favored class, and we ought not so to interpret their acts, unless constrained by the clearest and most unequivocal expressions of such an intention.

The judgment is right, and should be affirmed.

[MONROE GENERAL TERM, September 6, 1869. *E. D. Smith, Dwight* and *Johnson*, Justices.]

IRA EMERSON and others, infants, by George Clark, their guardian, *vs.* RAMIRO E. SPICER.

A guardian in socage has power, as such, to lease the lands of her infant wards until they shall become of age.

A lease executed by her, for a term of years, is *prima facie* a valid instrument, but is subject to be avoided, either by the coming of age of the infants, or by the appointment of another guardian.

The lessee takes his lease subject to the contingency of its being put an end to; and upon the appointment of a new guardian and his election to terminate the tenancy, the lessee is bound to leave the premises.

Such election may be made by a demand of possession of the premises, or the commencement of an action to recover the possession.

ACTION to recover the possession of real estate claimed by the plaintiffs as heirs at law of James Emerson, deceased.

James Emerson, the father of the infant plaintiffs, died intestate, on the 14th of September, 1864, seised of about 107 acres of land, on which he resided, and leaving the plaintiffs his only children and heirs at law, and his widow, Esther B. Emerson, who continued in the possession of the said premises, with the plaintiffs, who constituted her family. Her dower in the lands was never admeasured or assigned to her. The widow was, on the 29th of October, 1864, duly appointed administratrix of her husband's estate. On the 31st of January, 1866, she executed to the defendant a written lease of the said premises, and certain personal property, for the term of three years from April 1st then following. The defendant entered into possession of the premises, under and by virtue of the lease, and was in possession at the time of the commencement of this action, claiming the right to retain the same to the end of his term, viz., the 1st of April, 1869, by virtue thereof. During this period, Mrs. Emerson occupied a portion of the dwelling-house on the premises, under said lease, the plaintiffs residing with her; and she received her share of the proceeds of the farm, which were used for the support of herself and the infant plaintiffs.

On the 12th of March, 1868, George Clark was appointed guardian of the infants, and having demanded of the defendant a surrender of the premises, he, on the 23d of April, 1868, commenced this suit, to recover the possession.

The action was tried October 18, 1868, before Justice MULLIN, without a jury, who ordered a judgment declaring that the defendant was unlawfully in possession of the premises, and that the plaintiffs were entitled to immediate possession thereof, and to $106.32, costs of the action.

The following opinion was delivered by the justice before whom the action was tried:

MULLIN, J. The plaintiffs are entitled to judgment. The mother was guardian in socage, and as such had power to lease the lands of her wards until they became fourteen years of age, or another guardian was duly appointed. (3 *R. S. 5th ed., p.* 2, §§ 5, 6, 7.) On the appointment of another guardian, her power to lease, and all leases made by her of the wards' lands, ceased. (*Sylvester* v. *Ralston*, 31 *Barb.* 286. 2 *Kent's Com. and note f.* *Roe* v. *Hodgson*, 2 *Wil.* 129, 135. *Field* v. *Schieffelin*, 7 *John. Ch.* 150. *Holmes* v. *Seely*, 17 *Wend.* 75. *Putnam* v. *Ritchie*, 6 *Paige*, 399. *Byrne* v. *Van Hoesen*, 5 *John.* 66.)

It follows that the lease of the mother was valid only until Clark was appointed guardian, and the defendant is not protected by it. Judgment is therefore ordered in favor of the plaintiffs, for the premises described in the complaint, in fee.

Judgment being entered accordingly, the defendant appealed.

Anson B. Moore and *John C. McCartin*, for the appellant.

S. H. Hammond, for the respondent.

By the Court, BACON, J. The mother of the infants was guardian in socage of her children, who were owners of the fee, and she had, as such, power to lease the lands until they should become of age. The lease under which the defendant claimed to hold was *prima facie* a valid instrument, but it was subject to be avoided either by the coming of age of the infants, or by the appointment of another guardian. The youngest child was not fourteen when this suit was commenced, but on the 12th of March, 1868, George Clark was duly appointed guardian of the infants, and as such, on that day, he demanded of the defendant a surrender of the premises, and on the 23d of April, 1868, commenced this suit.

The statute (3 *R. S. 5th ed., p.* 2, § 7) provides that the rights and authority of every guardian in socage shall be superseded in all cases where a testamentary or other guardian shall have been appointed.

The question is, whether by this appointment the lease was absolutely avoided, or was only voidable at the election of the guardian. In *Roe* v. *Hodgson* (2 *Wil.* 129) this question was discussed, without a definite decision; but on a subsequent day the court unanimously held that the lease was void. (*Id.* 135.) It is somewhat singular, but this precise question does not seem to have been passed upon in any case reported in this State, nor in this country, except in the case of *Snook* v. *Sutton*, (5 *Hal.* 133,) which holds that the lease of an infant's lands, extending beyond the age of fourteen years, is voidable, provided the infant be then entitled to choose a guardian; or it may be avoided by the guardian chosen by the infant. If not absolutely void by the supersedeas of the statute, the guardian is authorized to determine the lease; and that was done, in this case, by the notice, or at all events by the commencement of this suit, which was an express determination and notice that the lease was determined, and the

defendant was holding over without right. The defendant took his lease subject to this contingency, and was bound to leave upon the election of the guardian to terminate his tenancy.

I think the judgment should be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 5, 1869. *Morgan*, *Bacon* and *Foster*, Justices.]

FOX *vs.* DUNCKEL.

The act of the legislature, of May 9, 1867, amending the act of April 23, 1862, "to prevent animals from running at large in the highways," and creating a short bar to actions arising under the act amended, is not in violation of section 6, art. 1, of the constitution of the State, which declares that no person shall be deprived of life, liberty, or property, *without due process of law.*

The act of 1862, which, in *Rockwell* v. *Nearing*, (35 *N. Y. Rep.* 302,) was held to be unconstitutional, so far as it authorized the seizure and sale of property without judicial process, for a private trespass, is, in that respect, distinguishable from the act of 1867 amending the same.

ACTION for the taking and detention of twenty-one cows claimed to belong to the plaintiff.

The action was referred to a referee, who found, as facts, that on the 5th day of August, 1867, the plaintiff owned the cows in question, and that on that day they entered and trespassed upon the lands of the defendant, in the town of Palatine, Montgomery county. That while the said cows were so trespassing, the defendant seized and took them into his custody. That on the next day, the 6th of August, he made complaint in writing, under oath, stating the facts, to L. Marcellus, a justice of the peace of the said town of Palatine. That the said justice forthwith issued a summons under his hand, stating the facts of such seizure and complaint, and requiring the owner of such

cows, or any party having an interest in the same, to appear before the said justice, at his office in the said town, on the 17th day of August, then next, at eleven o'clock A. M., to show cause why said cows should not be sold, and the proceeds applied according to the provisions of "An act to amend an act, entitled an act to prevent animals from running at large in the public highway." That the said summons was delivered to a constable of the said town, who, on the same day, served the same, as required by the said act, by posting copies thereof in six public and conspicuous places in said town. That while the defendant was retaining the said cows, under the act aforesaid, and after he had kept the same five days, and before the 17th day of August, the plaintiff commenced this action, and the sheriff took the cows and delivered the same to the plaintiff, who has ever since had the same. That during the said five days, while the cows were in the defendant's possession, he milked and had the milk of the same. That the cows were worth at least $1000.

And the referee found as a conclusion of law, and decided, that the defendant had the right, under the statute above mentioned, to seize the said cows, and take them into custody, and that he was in the lawful possession of the same at the time of the commencement of this action; that the plaintiff had no right to the possession of them without a compliance on his part with the provisions of the said act. And he further decided, upon the whole case, that the defendant was, at the time of the commencement of this action, entitled to the possession of the said cows; and he ordered judgment in favor of the defendant, against the plaintiff, in accordance with the above conclusion, with costs. From the judgment entered upon this report, the plaintiff appealed.

J. Genter, for the appellant.

J. D. Wendell, for the respondent.

By the Court, POTTER, J. The only question discussed, in this case, is the constitutional validity of the act of the legislature entitled "An act to amend an act to prevent animals from running at large in the highways, and to create a short bar to actions under said act." (*Laws of* 1867, *ch.* 814.) The second section of this act declares "it shall be lawful for any person to seize and take into his custody, and retain until disposed of according to law, any animal which may be trespassing upon premises owned or occupied by him." The third section authorizes and makes it the duty of any person who shall have seized and taken into his possession any animal, under the authority of the preceding section, to make immediate complaint in writing, under oath, stating the facts, to a justice of the peace of the town in which such seizure occurred. Such justice is thereby given jurisdiction to hear and determine such matter, and is directed to proceed in the same manner as in civil actions, except as specially charged in that act; and is directed forthwith to issue a summons, under his hand, stating the fact of such seizure and complaint, and requiring the owner of the animal, or any party having an interest in the same, to show cause before such justice, at a time and place to be specified in such summons, why said animal should not be sold, and the proceeds applied as directed in said act. The time to show cause is fixed, in the act, to be not less than ten nor more than twenty days from the issuing of the summons; any constable of the town, or any elector thereof, authorized to do so by the justice in writing thereon, is authorized to serve the summons; such service is required to be made by posting the same in at least six public and conspicuous places in said town, one of which places is required to be the nearest district school-house. At the time and place appointed for the return of the summons, the complainant and any person interested in such animal, or his agents, are allowed to appear in the proceedings, and on filing an oath sub-

scribed by him, denying any or all of the facts alleged in the complaint, shall be deemed to have joined an issue in the proceedings, and the subsequent proceedings are directed to be as in civil actions, so far as they can be; unless otherwise provided in the act. The section further provides for the return of the summons, the appearance of parties interested, a trial by jury &c. by the justice, and if no sufficient cause be shown, that a warrant be issued by the justice, directed to a constable of the town, commanding him to sell the animals at public auction, in the usual manner of constables' sales, for the best price he can obtain, and then return the proceeds of sale; and the justice shall then adjudge the costs of the proceedings, according to the rates specified in the act, and the damages sustained by the complainant by reason of the trespass; the surplus moneys to be paid to the owner or party entitled to the same, in the manner therein prescribed, and if not demanded within a year, to be paid to the owner or party entitled to the same, in the manner therein prescribed; and if not demanded within a year, to be paid by the justice to the overseers of the town, &c.

The sixth section provides for an appeal to the county court from the trial before the justice.

Such are, substantially, all the provisions of the act in question which are important to be considered, in passing upon this case; and if the act is constitutional, the proceedings under it are regular, and the defendant, on the trial, established a perfect defense.

It is claimed to be in violation of that part of section 6 of the first article of the constitution of the State of New York, which declares that no person shall be deprived of life, liberty, or property, *without due process of law.* This appeal is based upon the authority of *Rockwell* v. *Nearing*, (35 *N. Y. Rep.* 302,) which gave judicial construction to the act of 1862, of which the act in question is an amendment. That act was held to be unconstitutional, so far as

it authorized the seizure and sale of property without judicial process, for a private trespass. In that respect the act of 1867 is clearly distinguishable from the act of 1862. The act of 1867 clearly furnishes a court upon which it confers jurisdiction, in express terms, to issue process, to allow an issue to be joined, to hear the parties upon the merits, to adjudge thereon, as in other civil cases, with the right to appeal to a higher court, for review and trial. Besides, the case of *Rockwell* v. *Nearing* clearly recognized as constitutional, and as being *by due process of law*, all such summary proceedings as were recognized by statute, or at common law, prior to the adoption of the "bill of rights." The right to distrain cattle *damage feasant* is as old as American common law, and was recognized by our statutes prior to the adoption of our constitution, (2 *R. S.* 517; *5th ed., vol.* 3, *p.* 841; 3 *Black. Com.* 6;) and proceedings under that system which provides forms of trial, and due precautions against oppression, were ever regarded as "*by due process of law.*" "It was a proceeding," says Blackstone, "arising from the necessity of the thing itself, as it might otherwise be impossible at a future time, to ascertain whose cattle they were that committed the trespass or damage." (3 *Com.* 6.) The learned commentator might have added, had he lived in our day, that it might be sometimes doubtful whether the owner of the cattle was sufficiently solvent, taking into consideration what the statute exempts from liability to execution, to pay the damages done by the trespass. This proceeding is no new, severe, unknown, extraordinary or oppressive proceeding; nor is the statute to be regarded as penal, but remedial. The party injured is provided with a summary remedy, it is true, but a remedy established by long usage, and rules of statute and common law, entirely suited to the exigencies of the case, giving the owner full protection against all excesses or abuses which may grow out of the law. How then is this law unconstitutional? Surely the legisla-

ture is not prohibited from transferring the jurisdiction of assessing or appraising damages from fence viewers to justices of the peace. Nor can it be contended that justices are less qualified to appraise damages by sworn testimony, than fence viewers. Nor should the owner of beasts complain of a change of the law that gives him a jury of the vicinage to hear his defense, and to assess damages—nay, to add to his security by the right of appeal to a higher tribunal. If, then, the act in question, which confers jurisdiction on justices, is not inhibited by the constitution, the provisions made to carry out the proceedings to final judgment must be incident to the necessary exercise of the power conferred.

Nor can the court declare the act to be unconstitutional because of the possibility, or even probability, that the officers or parties with whom power is intrusted to carry out its provisions, may, or can, abuse that trust; or because a short statute of limitations is enacted, as to the right to the surplus arising from sales. The plaintiff is, I think, mistaken in his view of what the case of *Rockwell* v. *Nearing* decides. Some of the strong remarks of Judge PORTER in that case, based upon the assumption of the invalidity of the act of 1862, affording a summary remedy unknown to the common law, while appropriate in that case, do not apply to this. There it was held that there had been an abuse of power after the seizure of the cattle; here there had been none. That was not a seizure *damage feasant;* this is: that statute provided for seizure without judicial trial; this allows a trial, and a defense upon the merits. In this the proceeding was by due process of law; in that there was no such proceeding. The cases are dissimilar in principle.

I think the judgment should be affirmed.

[SARATOGA GENERAL TERM, November 1, 1869. *Bockes, Potter* and *Rosekrans*, Justices.]

WILLIAM G. FARGO, President of the American Merchants Union Express Company, *vs.* JAMES H. McVICKER.

Where an action is brought, in this court, against a citizen of another state, by the president of a joint stock association, in his own name, as such president, (he being a citizen of this State,) under the act of April 7, 1849, authorizing joint stock companies or associations to sue and be sued in the name of their president or treasurer, the case should be governed by the same principles of law which determine the question of citizenship in the case of *corporations* authorized by the laws of a state; and is removable into the Circuit Court of the United States, on motion.

The rule in respect to corporations is that established by the Supreme Court of the United States, viz., that a corporation is not itself a citizen, but for all purposes of the jurisdiction of the federal courts, the stockholders who compose the corporate body, by and under the name given them by the statutes of a state, are to be treated as citizens of that state; and they are estopped from denying that they are such.

The question of jurisdiction, in case of removal, must be decided by the Circuit Court itself. If it refuses to entertain jurisdiction, then the order for removal will be vacated, and the case will proceed in the Supreme Court.

Whether an appeal lies from the special to the general term, when the former, after making an order for removal, accepts the security tendered, and the other formal requisites pointed out in the acts of congress are complied with by the applicant for the removal, and the only question is whether the United States Court can entertain jurisdiction of the cause? *Quære.*

APPEAL from an order made at a special term, directing the removal of this action into the Circuit Court of the United States.

The action was commenced in this court by William G. Fargo, as president of the American Merchants Union Express Company, against James H. McVicker, a citizen of the State of Illinois. The company is a joint stock association; and the action was brought under the provisions of the act of the legislature, of April 7, 1849, "in relation to suits by and against joint stock companies and associations," by which it is enacted that "any joint stock company or association may sue or be sued in the name of the president or treasurer," &c. (*Laws of* 1849, *chap.* 258; 3 *R. S. 5th ed.* 777.)

The defendant applied to the court at a special term, for the removal of the action into the Circuit Court of the United States, under the acts of congress of 1789, and March, 1867. The application was opposed, upon an affidavit showing that certain stockholders in the company were citizens of other states than the State of New York. The special term granted the application to remove, and the plaintiff appealed.

Bowen & Rogers, for the appellant.

C. A. Seward and *Geo. B. Hibbard*, for the respondent.

By the Court, LAMONT, J. Two questions are made, in this case. The plaintiff claims that this action is not removable from the State court into the Circuit Court of the United States, under the act of congress of 1789, or the act of 1867. The defendant, on the contrary, insists that the cause is removable, and that the order of the special term of this court, staying the plaintiff's proceedings and sending the case to the said Circuit Court, is not an appealable order.

It is not disputed that all the formalities necessary to the removal have been complied with by the defendant, if the case is one that falls within the provisions of either of the acts of congress referred to. The defendant is a citizen of the State of Illinois.

If the plaintiff is a citizen of the State of New York, or if the stockholders composing the American Merchants Union Express Company are to be regarded as the real plaintiffs, and they are either in fact or by construction of law citizens of the State of New York, then the order for the removal of the cause was properly made.

William G. Fargo is himself a citizen of the State of New York. If the suit be his, the action is removable.

If the company, or the shareholders who compose it, be

the real plaintiffs, by the authorized and legal style and title assumed in the complaint, then the question arises, whether those individuals represented by such title in this action by virtue of the statutes of this State, are, for the purposes of the jurisdiction of the federal courts, to be treated as citizens of the State of New York. This question arises under the constitution and the laws of the United States; and for its true and final determination we look to the authoritative arbiter of all such questions—the Supreme Court of the United States. That court holds that a corporation is not itself a citizen, but that for all purposes of the jurisdiction of the federal courts, the stockholders who compose the corporate body, by and under the name given them by the statutes of a state, are to be treated as citizens of that state; and that they are estopped from denying that they are citizens of the state whose laws, alone, empowered them to appear in the courts of justice by the name of their legal christening under the state laws. Neither in the constitution of the United States nor in the acts of congress referred to, is the word corporation, or any other word of similar import, employed in connection with the subject under consideration. The term used is citizen—"controversies between *citizens* of different states." (*Const. U. S. art.* 3, § 2.) "If a suit be commenced in any state court, by a *citizen* of the state in which the suit is brought, against a *citizen* of another state," &c. (*Act of* 1789, 1 *Stat. at L.* 79; *Act of* 1867, 14 *Stat. at L.* 559.) The same reason that applies to a corporate body applies with equal force to an associate body; and the reason is, that the persons composing each, though multitudinous in number, and scattered by habitation over many states, are aggregated by the state laws, under which they appear by a fictitious name or designation. They are legalized for litigious purposes into one artificial body, by which they are endowed with the new faculty of suing and

being sued by the name and style conferred upon them by a state law.

In the present case, the shareholders, consisting of several thousand persons, citizens of, and residents in, various states, including both the States of New York and of Illinois, are embodied, for the purpose of suing and being sued, into a new, legal personality by the name used in this action; and this new faculty of acting and appearing in the courts is given by the laws of the State of New York. (*Laws of* 1849, *chap.* 258.)

As to being sued or bringing suits by the fictitious name conferred by the State statute, they stand in the same predicament as if they were in all respects a perfect corporation created by such State law. It is the State law itself that gives this multitude of shareholders legal capacity to go into court, whether as plaintiffs or defendants, by a name furnished for that purpose under the State law. In this respect they are the same as a corporate body—whether they be a corporate body, an associate body, a joint stock company or association, by whatever designation they may be known. The reason why they are treated, for the purposes of federal jurisdiction, as citizens of the state whose laws they have invoked to enable them to be and appear by one name and style in tribunals of justice, applies aptly to every aggregation of persons invested by state law with this faculty of suing and being sued by the new name, which, under such statutory provisions, represents the entire body of shareholders. In this particular, as party litigant, a corporation and an associate body are identical. The reasoning that applies to one, applies to the other; and that reasoning will be seen at large in *Marshall* v. *The Baltimore and Ohio Railroad Co.*, (16 *How. U. S. Rep.* 325 *to* 329.) And see *Covington Draw Br. Co.* v. *Shepard et al.*, (20 *id.* 233.)

In the case first cited, the grounds for the construction of the federal constitution and laws are given with great

force. (16 *How. U. S. Rep.* 326.) Justice Grier, delivering the opinion of the court, says: "Now if this be a right or privilege guarantied by the constitution to citizens of one state, in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the state in which the defendant resides. If A., B. and C., with other dormant or secret partners, be empowered to act by their representatives, to sue or to be sued in a *collective* or corporate name, their enjoyment of these privileges granted by state authority, cannot nullify this important right conferred on those who contract with them." Again, at page 327: "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing and being sued, in a fictitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent. Nor is it reasonable that representatives of numerous, unknown and ever changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff's privilege."

It will be seen in the extracts given, and more fully in the opinion at large, that the whole force of the reasoning applies to any aggregate body of shareholders authorized by State law to sue and be sued by their collective name, or the name given them for litigious purposes, by the State law. "In courts of law," says this learned judge, "an act of incorporation and a coporate name are necessary to enable the representatives of a numerous association to

sue and be sued." And it is for this reason that reference is so often made to corporations, in this and other cases bearing upon the question.

But by the act of 1849 the representatives of a numerous association are enabled to sue and be sued without the act of incorporation or the corporate name; but by its equivalent, a legal association and a legitimate statutory name. By this name the whole collective body of shareholders are represented in the courts. The name represents them, as the corporate name represents all the corporators or stockholders, the name given in each case by the State law for that purpose.

I am of opinion that the present case should be governed by the same principles of law which determine the question of citizenship, in case of corporations authorized by the laws of a state; and that the order appealed from was properly made.

Who is to determine whether this action is removable into the Circuit Court of the United States? The Court of Appeals has held that the question of jurisdiction must be decided by the Circuit Court itself, (*Illis* v. *N. Y. and N. H. Railroad Co.*, 3 *Kern.* 597,) and has pointed out the proper practice to be pursued. If the Circuit Court refuses to entertain jurisdiction, then the order complained of will be vacated, and the case will proceed in the Supreme Court. This course of proceeding avoids all conflict between the State and federal courts, leaves the decision where it constitutionally belongs, and conforms to the views of the Court of Appeals in a similar case before them, where an appeal was dismissed.

It is a doubtful question whether an appeal lies from the special to the general term when the former accepts the security tendered, and the other formal requisites pointed out by the act of congress are complied with by the applicant for the removal, and where the formalities are fully complied with, and the only question is whether the

United States Court can entertain jurisdiction of the cause. I think the latter court should be applied to for the decision of that question. If that court entertains the suit, state courts cannot overrule the decision; but if the Circuit Court declines the jurisdiction, then a motion can be made to vacate the order, instead of appealing from it.

My brethern are of opinion the order appealed from should be affirmed, and it is affirmed, with $10 costs.

[Erie General Term, November 15, 1869. *Marvin*, *Barker* and *Lamont*, Justices.]

Abram Witbeck *vs.* Alexander Holland, Treasurer of the American Express Company.

It is the duty of an express company, upon a package being intrusted to it for transportation, to ascertain by all reasonable inquiry, the residence of the consignee, at the place to which the package is directed, and to deliver it to him personally, at his residence or elsewhere.

An express company cannot relieve itself from the liability arising from the non-performance of this duty, nor change its responsibility from that of a common carrier to that of warehousemen, by giving notice to the consignee, either by letter or personally, that the package is at its office, ready to be delivered to him upon being called for.

Its contract is to transport the package to the place where the consignee resides, as indicated by the direction upon it; to search for him at that place; and to deliver the package to him at his residence, or place of business, or elsewhere. But the consignee is under no obligation to call at the express office for the package; nor to do more than notify the company where he may be found, at the city or town, upon *receiving* notice in some way, that the package has arrived, and that the company has made efforts to find his residence or place of business, and was unable to ascertain either.

Where an express company undertook to carry and deliver a package addressed to "Martin Witbeck, Schenectady," and on its arrival at that place, not knowing the consignee, nor finding his name in the directory, addressed a note, through the post-office, to "Martin Whitbeck," stating that the company had received a package, (describing it,) and that it was at the risk of the owner, at the express office; *Held* that even if such note had been received by the consignee, it would not have relieved the company of its liability as a common carrier, for the loss of the package by theft.

And it being shown that the consignee resided at Schenectady; that the residence at that place of two families of the same surname as the consignee, was communicated to the agent of the express company, and that no inquiry was made of either of those families, for the residence of the consignee, when inquiry of either must have disclosed it; *Held* that the negligence of the company was established.

Where the contract between a consignor and an express company, under which a package was forwarded by that company from the place of its receipt to New York, and there delivered to another express company, for transportation to Schenectady, was, by its terms, to terminate upon the delivery of the package, by its agent, in New York, to other parties, to complete the transportation to the consignee; and it contained no provision as to the liability of parties to whom the package might be delivered by the company receiving it; and did not provide for the carrying of the package over the whole route; and there was no arrangement between the two companies for the transportation of packages over the entire route; *Held* that the contract between the company receiving the package, and the consignor, had no effect upon, and did not control, the liability of the company to whom the package was delivered by the one receiving it.

That, under the circumstances, the company undertaking to carry the package over the latter part of the route, was to be deemed to have received it under no special arrangement, but under the general responsibility of express carriers, without limitation or qualification, except such as the law attaches to such carriers.

APPEAL from a judgment entered upon the report of a referee.

The plaintiff, who was a soldier at Hart's Island, having received his bounty, delivered a part of it ($320) to the Adams Express Company to carry to his brother, Martin Witbeck, Schenectady, N. Y., for safe keeping. That company brought it to the city of New York, and there delivered it to the defendants' company. The latter carried it to Schenectady, and delivered it to its agent there, about December 5, 1865. The agent at Schenectady, not knowing the consignee, examined the city directory, to find him. His name was not in either directory, although two were published for that year. These directories contained the names, Abram Whitbeck, Garret Whitbeck, conductor, Luke Whitbeck, conductor, Peter I. Whitbeck and Daniel Witbeck. Peter I. was the father, and Daniel

was the brother, of the consignee, while Abram was a distant relative. The two conductors lived at one house. The father, Daniel and the consignee, lived in one house. Not finding the name in the directory, the agent made out a notice, intended to be addressed the same as the parcel, and deposited it in the post-office, notifying the consignee of the arrival of the package, and asking him to come and get it. The notice was addressed "Martin Whitbeck, Schenectady, N. Y.," while the parcel was addressed "Martin Witbeck," &c. The notice never was received by Martin. The plaintiff wrote to his brother, about the parcel, December 8, 1864, but the letter was not received until February, 1865. Martin immediately went to the office of the defendants' company, and demanded the parcel, but was informed that it had been stolen, on the 17th of January, 1865. Their safe had been blown open, and it, with other parcels, had been taken by the burglars.

The referee reported in favor of the plaintiff, and judgment being entered, the defendant appealed.

Hooper C. Van Vorst, for the appellant.

John L. Hill, for the respondent.

By the Court, Rosekrans, J. The evidence fully justified the referee in finding that the defendants did not make due effort, nor use due diligence, to find Martin Witbeck, the consignee of the package for the recovery of which the action is brought.

It appears by the testimony of John Bradt, one of the defendants' witnesses, that in December, 1864, soon after the arrival of the package at the defendants' office in Schenectady, Morse, the defendants' agent, made inquiry of him as to Martin Witbeck, the consignee; and although Bradt did not know Martin Witbeck, Morse was informed by him of the residence in Schenectady of Fort Witbeck,

Peter I. Witbeck, and the two Witbecks who were conductors upon the railroad. The defendants' agent therefore made inquiry of the two conductors, but made no inquiry of the other two Witbecks, whose names had been communicated to him. One of whom was the father, and the other the brother of Martin Witbeck, the consignee; and with the former of whom Martin Witbeck was then living, at No. 11 Park Place. It is quite clear that had the defendants made inquiry of the consignee's father, they could have ascertained where the consignee could have been found, and thus have been enabled to fulfill their contract to deliver the package to him personally.

It was the duty of the defendants to ascertain, by all reasonable inquiry, the residence of the consignee at Schenectady, and to deliver to him, at his residence or elsewhere, the package intrusted to them for that purpose. This duty is implied from the very nature of the business in which the defendants were engaged, and for the service of carrying the package, and ascertaining the residence of the consignee, and the delivery of the package to him personally, they were entitled to charge a reasonable compensation. Nor could the defendants relieve themselves of the liability arising from the non-performance of this duty, nor change their responsibility from that of a common carrier to that of warehousemen, by giving the notice to the consignee, either by letter or personally, that the package was at their office, ready to be delivered to him upon being called for. The defendants' contract was to transport the package to the place where the consignee resided, as indicated by the direction upon it; to search for him at that place, and to deliver the package to him at his residence, or place of business, or elsewhere; but the consignee was under no obligation to call at the office of the defendants for the package, nor to do more than to notify them of his residence or place of business, or where he might be found, at Schenectady, upon *receiving* the

notice in some way, that the package had arrived, and that they had made efforts to find his residence or place of business, and were unable to ascertain either.

Had the letter, which the defendants caused to be deposited in the post-office at Schenectady—addressed, not to Martin Witbeck, but to Martin Whitbeck—been received by him, it would not have relieved the defendants from their liability as common carriers, for the loss of the package. It contained no information to the person to whom it was addressed that the defendants were not able to fulfill their contract by delivering the package to the consignee; or that they had made any efforts to ascertain his residence or place of business, which were ineffectual. It merely stated that the defendants had received the package, (describing it,) and that the package was at the risk of the owner, at their office. The consignee might, upon the receipt of this letter, have remained silent, or answered to the defendants in these words: "Fulfill your contract to deliver the package to me; and as to the package being at my risk while it remains in your hands, I would say, you have no right to impose such terms, unless they were contained in the original contract under which you received the package, and if they were, the information is unnecessary on your part."

The general rule is that a common carrier is bound not only safely to convey, but safely to deliver, a parcel which he has undertaken to carry, at the place to which it is directed, to the consignee, personally. Personal delivery, however, is sometimes dispensed with in the case of carrying by ships, boats and railways. Notice given to the consignee of the arrival and place of deposit, comes in lieu of personal delivery, in such cases. (*Fisk* v. *Newton*, 1 *Denio*, 45.) The rule is different, however, in regard to express carriers.

The duties of express carriers are stated in an article written by Judge Redfield, published in the American

Law Register, (*vol.* 5, *N. S. p.* 7,) as follows: "In turning our attention more especially to the responsibility of express carriers, the first consideration distinctive of this mode of transportation is, that they are bound to deliver parcels to the persons to whom they are addressed. This was the general rule as to carriers by land, until since the introduction of railways. (*Hyde* v. *Trent and Mersey Nav. Co.*, 5 *T. R.* 389. *Stephenson* v. *Hart*, 4 *Bing.* 476. *Farmers and Mechanics' Bank* v. *Champlain Trans. Co.*, 23 *Verm. Rep.* 186.) Since the introduction of railways, carriers in that mode have been exempted from personal delivery of their parcels, and allowed to deposit them in warehouses, and thus exonerate themselves from the longer continuance of the responsibility of carriers. (*Thomas* v. *Boston and Prov. Railroad Co.*, 10 *Metc.* 472.) But the great necessity of having express carriers arose from this defect in delivering of goods by the ordinary railway transportation, and the same defect also existed in regard to the delivery of goods transported by steamboats. They could only deliver at the wharves, and were not expected to employ special messengers and porters to deliver their goods. (*Chickering* v. *Fowler*, 4 *Pick.* 371.) But it was to remedy this inconvenience and restore the carrying business by land to its former state, in some degree, that express companies have come into use, with the distinctive character of making personal delivery of their parcels to the consignees. (*Redfield on Railways*, § 127.) This has been so often decided that it is scarcely required that any considerable number of cases should be cited. This question is considerably examined, and the views stated fully confirmed, in the case of *Baldwin* v. *The American Express Company*, (23 *Ill. R.* 197; *affirmed*, 26 *id.* 504.")

It is claimed that the contract between the consignor and the Adams Express Company, under which the package was forwarded by the Adams Express Company from Hart's Island to New York, and there delivered to the de-

fendants for transportation is to control the liability of the defendants, and limit it to that of forwarders, merely. It appears, however, that the contract with the Adams Express Company, by its terms, was to terminate upon the delivery of the package by its agent in New York, to other parties, to complete the transportation to the consignee. It contains no provision as to the liabilities of parties to whom the package might be delivered by the Adams Express Company. It did not provide for the transportation of the package over the whole route. Under these circumstances, the contract between the Adams Express Company and the consignor has no effect upon the liability of the defendants. They received the package under no special arrangement, but under the general responsibility of express carriers, without limitation or qualification, except such as the law attaches to such carriers.

The evidence given by the plaintiff, that Martin Witbeck was well known at Schenectady, was wholly immaterial, and should have been rejected by the referee; but its introduction could not possibly have tended to the injury of the defendants. The negligence was established by showing that the consignee resided at Schenectady; that the residence at Schenectady of two families of the same surname as the consignee was communicated to the defendants' agent; and that no inquiry was made of either of those families for the residence of the consignee, when inquiry of either must have disclosed it. The judgment should not be reversed for this erroneous evidence.

The judgment should be affirmed.

[SCHENECTADY GENERAL TERM, January 4, 1870. *James, Rosekrans, Potter* and *Bockes*, Justices.]

THE PEOPLE *vs.* WILLIAM HAYNES.

It is unnecessary to state, in an indictment, the names of the jurors by whom it is found.

An indictment for arson need not charge that the setting fire to the building was willfully done. A charge that the defendant "unlawfully, maliciously and feloniously, in the night time, did set fire to a certain grist-mill," is equivalent to a charge that the act was willfully done. It is, in point of fact, a charge that it was *designed*, intended, and hence willful.

A charge that the defendant "set fire to a certain grist-mill, then and there being, owned by, and in the possession of, one W.," is sufficient to meet the requirements of the statute as regards the crime of arson in the third degree.

It is not an inflexible rule of law that a jury may not, in a criminal case, convict a defendant upon the uncorroborated testimony of an accomplice; the fact of the witness being a confederate going to his or her credibility, only.

The statements of such a witness are to be received with great caution. If, however, they carry conviction to the mind of the jury, and they are fully convinced of their truth, they may convict, upon them.

It is, however, the duty of a jury to scan the testimony of an accomplice with the utmost severity; and as verdicts rendered upon the uncorroborated evidence of confederates are of doubtful propriety, they will not, in general, be allowed to stand if the witness be otherwise impeached.

In such cases, a just regard to the rights of the accused demands an observance of the strictest rules in the admission or rejection of evidence.

The mere fact that evidence tends to prove that the accomplice is truthful in some respects is not sufficient to authorize its admission. It should be as to some fact the truth or falsehood of which goes to disprove the offense charged *against the prisoner*. It must tend to fix the guilt on the person charged; and the rights of the accused should not be prejudiced by confirmation on immaterial points, or as to facts which in no way connect him with the offense.

Where, on the trial of an indictment for arson, the alleged accomplice testified that the defendant promised her $400 to burn the building, and afterwards paid her $40 upon it, $30 of which she paid to W.; *Held* that it was improper to allow the district-attorney to prove by W., in corroboration of the statement of the accomplice, that she paid him $30, about the time stated by her.

Where witnesses were called to impeach the general character of the accomplice, and the district-attorney called witnesses to sustain it, who testified that prior to the fire they would have believed her on oath; *Held* that although such testimony might be proper, the jury were to determine the credit of the accomplice *at the time she testified*. That the defendant was entitled to ask them, on cross-examination, whether they would believe her on oath *at the time of the trial;* and that the court erred in sustaining an objection to such question.

Held, also, that the fact that the court had limited the number of impeaching and sustaining witnesses to six, and the defendant had called that number, did not change the rule. That such restriction did not limit the right of putting questions, on cross-examination of the sustaining witnesses, with a view to test the value of their opinions as to the integrity of the accomplice, as a witness, *at the time* of the trial.

THE defendant was convicted at the Schenectady oyer, in 1868, of the crime of arson, in the third degree. The specific offense charged in the indictment was, that on the 4th April, 1867, he feloniously, in the night time, set fire to a certain grist-mill, the property of one Frederick Whittlesy.

On the trial, evidence was given by one Margaret A. Bronk, that she set the fire at the request and on the instigation of the defendant, who, as she testified, prepared the material to be ignited, and was, at the time, in the immediate vicinity of the mill, with the purpose of rendering aid in effecting her escape from the premises if necessity required. The conviction rested solely on the evidence given by this witness; the corroborating testimony, if indeed there was any, being so slight and insignificant as to be unworthy of notice. The witness, a married woman, aged about twenty-five years, testified that she had been for many years on terms of criminal intimacy with the defendant; that he was the father of two of her children; that their intimacy was at the time known to her husband; that their relations for a time prior to the fire were unfriendly, but that they had become reconciled and again intimate. The witness further stated that the defendant first asked her to induce her husband to burn the mill, and it being suggested to him he refused; that the defendant had given her money at various times—on one occasion four $10 bills; that she paid $10 to Mr. Stevens, and the rest to one Westfall; that the defendant stated to her as his reason for wishing the destruction of the mill, that he wanted to get the mill-seat. The defendant formerly

owned the mill premises, and sold them to Whittlesy in 1864, but had been fully paid therefor; the last payment having been made in February preceding the fire, to prevent a foreclosure of a mortgage taken by the defendant for part of the purchase money. After such payment the defendant had no right or interest in the property destroyed. Evidence was also given tending to an impeachment of the witness irrespective of her position as an admitted accessory to the crime charged against the defendant. She was contradicted in some of her statements, and evidence of general bad character was given. The counsel for the defendant asked the court to direct an acquittal on the grounds: (1.) That the indictment did not contain the names of the jurors by whom it was found. (2.) That it did not charge that the setting fire to the building was willfully done. (3.) That it did not charge expressly or by implication that the building alleged to have been burned was not the subject of arson in the first degree. The court declined to direct an acquittal, as requested, and the counsel excepted. Exceptions were also taken to the admission and rejection of evidence, and also to portions of the charge as well as to refusals to charge, which exceptions are hereafter considered, in so far as they are deemed to affect the rights of the defendant.

John L. Hill, (district-attorney,) for the people.

N. C. Moak and *Henry Smith*, for the defendant.

By the Court, BOCKES, J. The refusal of the court to direct an acquittal of the defendant was manifestly right. It was unnecessary to state in the indictment the names of the jurors by whom it was found. This was expressly decided in the case of *The People* v. *Bennett*, (37 *N. Y. Rep.* 117.) The second objection urged, that the indictment omits to charge that the setting fire to the building was willfully

done, was not well founded in fact. It was charged that Haynes "unlawfully, maliciously and feloniously, in the night time, did set fire to a certain grist-mill." This language is equivalent to a charge that the act was willfully done. It is, in point of fact, a charge that it was *designed*, intended, hence willful. The third ground of objection is also untenable. The charge is, that the defendant "set fire to a certain grist-mill, then and there being, owned by and in possession of one Frederick Whittlesy." This was sufficient to meet the requirements of the statute as regards the crime of arson in the third degree, which declares the willful setting fire to "a grist-mill" to be arson in the third degree.

The case was plainly one for the jury, on the evidence. It would have been manifestly improper to have taken it from them on any of the grounds urged. It is true the only evidence to establish the guilt of the party was the uncorroborated testimony of a confederate in the crime. But whatever opinion the court may have entertained in regard to the integrity and reliability of the witness, the question of guilt or innocence was for the jury. The witness was not incompetent to testify, because an accomplice. Such admitted fact affected her credibility only, and it was for the jury to say whether her statement was credible and a safe reliance for a verdict against the party charged. Such is now the settled rule in this State, even where the accomplice stands entirely uncorroborated. Mr. Justice Beardsley remarked in *The People* v. *Costello*, (1 *Denio*, 83,) that "although it has often been said by judges and elementary writers, that no person should be convicted on the testimony of an accomplice, unless corroborated by other evidence, still there is no such inflexible rule of law. It is a question for the jury, who are to pass upon the credibility of an accomplice, as they must upon every other witness." He adds, "his statements are to be received with great caution, and the court should always so advise;

but after all, if his testimony carries conviction to the mind of the jury and they are fully convinced of its truth, they should give the same effect to such testimony as should be allowed to that of an unimpeached witness who is in no respect implicated in the offense." This language of Mr. Justice Beardsley was quoted with approval in *Haskins* v. *The People*, (16 *N. Y. Rep.* 344–352.) Judge Comstock said in *The People* v. *Dyle*, (21 *id.* 578, 9:) "There is no rule of law which prevents a conviction on the testimony of an accomplice alone. The utmost caution should undoubtedly be exercised; but juries are nevertheless at liberty to convict on the unsupported testimony of a confederate in the crime." To the same effect are the remarks of Mr. Justice Ingraham in *Dunn* v. *The People*, (5 *Park. Crim. Rep.* 120;) see also 1 *Greenleaf on Ev.* §§ 380, 381. But, notwithstanding the jury may convict on the unsupported testimony of an accomplice, yet it is, as remarked by Mr. Greenleaf, so generally the practice on the trial for the court to advise an acquittal in the absence of corroborating proof, that its omission would be regarded as an omission of duty on the part of the judge; and the same learned writer on the law of evidence, adds that so great respect is always paid by the jury to such advice from the bench, that it may be regarded as the settled course of practice, not to convict in any case of felony upon the sole and uncorroborated testimony of an accomplice.

It is a well settled rule, not to be departed from in criminal cases especially, that no issue shall be decided against a citizen without testimony equivalent at least to that of one credible witness. Therefore verdicts rendered on the testimony of confederates wholly uncorroborated, are of doubtful propriety, and will not in general be allowed to stand, if the witness be otherwise at all impeached.

It was the manifest duty of the jury in this case to scan the testimony of Mrs. Bronk with the utmost severity. In

addition to the fact that she admitted herself to be a felon, she was shown to be unblushing in her immoralities and notoriously untruthful. While several witnesses testified to the contrary, not one of the eleven who spoke to her general character gave the opinion that she was *then* a credible and reliable person. She was also contradicted in her statements given as a witness on the stand. Nor does her story commend itself to the fullest credence, by reason of its inherent probability. It is difficult, if not impossible, to find a motive for the crime. There was no ill feeling existing between the defendant and Whittlesy, the owner of the mill, to excite hatred or induce revenge. Their relations were friendly. The defendant had no direct interest to be subserved by its destruction. The remote hope (as stated by Mrs. Bronk) that he might obtain the mill-seat, should the mill be burned, was infinitely weak as an inducement to commit a high crime. His chance of obtaining it would then be one in common with that of all his neighbors and others who might desire to secure it by fair, open purchase. The destruction of the mill gave him no advantage over other competitors for the site. Again; she testified that the defendant wanted her to get her husband to burn the mill for him; that she mentioned the subject to him, and he refused, saying that the defendant hadn't money enough to hire him to do it; that he could not get him to states prison. Was it not strange indeed that the defendant should seek the aid of a man in the commission of a crime, whose jealousy and hatred were already aroused by reason of his known intimacy with his wife? Would he not be cautious about putting himself in that man's power? Mrs. Bronk says the defendant then persuaded her to burn the mill. Was it not strange that he should put himself in her power? Why not do the act himself and avoid the risk of having his purpose known to others? He did not seek to avoid suspicion by absence, for Mrs. Bronk says he was at or

near the mill when she applied the match; and he must therefore have fled from it with her, or at the same time she did. It was in proof that he was at his own house when the alarm was given.

Now, in this condition of the case, the jury must have been in some doubt—some perplexity—as to the propriety of convicting on the testimony of this confederate. They are presumed to have been warned by the court of the danger attending a conviction on testimony from a source confessedly corrupt. They doubtless examined the evidence with great care, as they had been instructed and were bound to do, considering every minute circumstance tending in the least degree to a corroboration of the statement made by the witness. They would be undoubtedly influenced by slight confirmatory facts; very little would turn the scale and control the verdict. A just regard to the rights of the accused, therefore, demands an observance of the strictest rules in the admission and rejection of evidence. Let us now see if any evidence was improperly admitted bearing on the question of corroboration.

Mrs. Bronk testified that the defendant promised her $400 if she would burn the mill; which sum would buy for her a place she desired to purchase. It seems that the place was owned by Westfall, for whom Stevens was agent. She further testified, that soon after the fire, Stevens called on her and inquired if she wanted the place; whereupon she went to the defendant, at the paper mill, and obtained from him forty dollars—four ten dollar bills; that she paid Stevens ten dollars, and afterwards went to Quaker street to complete the transaction, and there paid the balance of the money ($30) to Westfall. Stevens was called, and testified that Mrs. Bronk gave him ten dollars—a ten dollar bill—to bind the bargain for the place; then arranged with him to meet him at Quaker street to complete the transaction for the property; and that they met at Quaker street, pursuant to the arrangement, and

then she paid three ten dollar bills to Westfall's agent. All and every part of this evidence was admitted against the defendant's objection. If the evidence tended to corroborate Mrs. Bronk in any material part of her testimony, it was properly admitted, otherwise its admission was error, inasmuch as it was urged upon the consideration of the jury as matter of corroboration, and doubtless to a greater or less extent influenced their verdict. Unquestionably this evidence tended to prove that Mrs. Bronk told the truth in several particulars. But that alone was not sufficient to authorize its admission as corroborating proof. As was said in *Rex* v. *Addis*, (6 *Car. & P.* 388,) "The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which go to prove or disprove the offense charged against the prisoner." To the same effect is the decision in *The Commonwealth* v. *Bosworth*, (22 *Pick.* 397;) also in *Rex* v. *Webb*, (6 *Car. & Payne*, 595;) and in *Rex* v. *Wilkes*, (7 *id.* 272.) In the latter case, Alderson, B., says: "The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged." I am aware that there are cases holding that the confirmatory proof need not in all instances affect the identity of the accused, or necessarily connect him with the offense charged. But the decisions above cited are now held better to accord with sound principles of law. It seems, therefore, that if corroborating evidence be admitted, it must be such as has some necessary connection with the guilt of the party charged, or of the correctness of the statement of the accessory in relation to such evidence. True, a party may be convicted (although he in general will not be) on the uncorroborated evidence of an accomplice; but if the case is to be strengthened by corroborating proof, the rights of the accused should not be prejudiced by confirmation on immaterial points, or as to facts which in no way connect

him with the offense. Mrs. Bronk testified that the defendant agreed to arrange, and in fact arranged, the combustibles, left the window open for her to enter, placed a box under the window, to render access easy, was near the mill when she set the fire, and left the building; that he then signaled her. All these facts were material on the question of the defendant's guilt; and proof of either, by the testimony of another person, would have been admissible to corroborate Mrs. Bronk. So, too, the fact of giving her money soon after the fire, she having sworn that he agreed so to do, if an unusual circumstance, or if the sum was unusual in amount, might be admissible. But the fact proved by other witnesses, that the mill was burned at the time she stated, was no corroboration of her testimony that it was burned at the defendant's instigation. She also swore that she met the defendant on the evening of the fire, in the street, and at her house, when the perpetration of the crime was arranged between them. For him to meet her at her house, or openly in the street, was no unusual circumstance. Would other proof of the fact that they so met have been corroborating evidence on the issue of the defendant's guilt? Clearly not. Proof of what they said, if overheard, and if it comported with her statement as to the arrangement to commit the crime, would have been corroborating evidence. So, too, proof by other witnesses of their intimacy, while it corresponded with her testimony as to that fact, did not corroborate her on the material point in issue. It seems to follow that proof of the simple fact that the defendant gave her money, which it appeared he was accustomed to do; and especially of the more remote and irrelevant circumstance, that she paid that or similar money to third persons, just as she testified she did, was not corroborating evidence that he employed her to commit the felony. Perhaps it was admissible to show that he in fact gave her money; but considered in connection with the additional fact that he

was accustomed so to do, it rested on the extreme verge of propriety.

The remaining evidence, introduced with a view to corroboration, that she arranged to meet a third person at Quaker street, to close the arrangement for the place, and that she in fact paid similar money to that she said she received from the defendant, to third persons, was clearly remote and irrelevant to the issue. This evidence was improperly admitted; and it was of a character, as the case stood before the jury, likely to affect their verdict. Its admission was therefore error.

It is also insisted that evidence bearing on the question of the credibility of Mrs. Bronk was improperly excluded.

The defense sought to impeach the witness by evidence of general character. Six witnesses were introduced, each of whom swore that her character was bad; that her reputation for truth was bad, and had been for a period extending back almost to her childhood; that they would not believe her on oath. Counter evidence was given on the part of the people, by five witnesses, who testified that they were acquainted with her character, and that they would, *prior to the fire and to her arrest*, have believed her on oath. On cross-examination of two of these witnesses, the defendant's counsel sought to show that her character at the time she testified was bad, and that they would not then believe her on oath. This evidence was objected to, (1.) On the ground that the inquiry should be limited to what her character was before the fire. (2.) That the number of impeaching witnesses had been limited by the court to six on a side, and that the defendant had exhausted his full complement. The objection was sustained, and the evidence excluded. If excluded on the first ground of objection, it was manifest error. The jury were to determine the credibility of the witness at the time she testified. The question for them was whether she was then, at the time she spoke, a truthful and reliable witness. It

was competent for the district-attorney to fix the limit of his inquiry at some prior period, but the point to be reached by the proof was, for all that, her standing for truth and veracity at the time she testified. As was said in *Willard* v. *Goodnough*, (30 *Verm. Rep.* 397,) "it is practically impossible to limit the scope of the answer to any particular period. The testimony, when given under such a question, will bear more or less strongly upon the present character of the impeached witness, according as it fixes the existence of the bad character at a more or less recent point of time. * * * The present character is the point in issue. What the character formerly had been is relevant only as it blends with the continuous web of life and tinges its present texture." See also *Rucker* v. *Beaty*, (3 *Ind. Rep.* 70;) *Rogers* v. *Lewis*, (19 *id.* 405;) *Arnold* v. *Cobb*, (21 *id.* 492.)

So it might be argued, that if Mrs. Bronk was a person whose statements upon oath were to be credited before the commission of the felony, she was still, under the circumstances of the case, at the time of testifying, also to be credited. In *Sleeper* v. *Van Middlesworth*, (4 *Denio*, 431,) Judge Beardsley remarked that the law indulged a strong presumption against any sudden change in the moral as well as the mental and social condition of man; that a state of mind once proved to exist is presumed to remain unchanged till the contrary appears. Now the district-attorney proved Mrs. Bronk to be a credible person, in the opinion of the witnesses, prior to the fire, and rested, as well he might, according to Judge Beardsley, on the presumption which such opinion supported. The defendant then had a right to meet and overthrow this presumption, by inquiring of the witnesses, on cross-examination, whether they would then believe her upon oath. If they would not, the argument and inference in favor of her credibility, based on her former standing in community, were effectually overcome; and if they would still deem her credible,

considering her present general character and her sworn admission of guilt, such fact was important with a view to test the value of their opinion favorable to Mrs. Bronk's integrity as a witness given on their direct examination. It is plain, I think, that this was a proper subject of inquiry on cross-examination of witnesses who had spoken to her credibility at a period long anterior to the trial.

But it is to be presumed that the evidence was excluded on the ground of objection secondly stated, to wit, that the number of impeaching witnesses had been limited to six on a side. It was undoubtedly competent for the court to limit the number of witnesses to be examined on the question of general character. But did such limitation as to number also limit the right of cross-examination? Palpably it did not; nor should it have that effect; otherwise the test of cross-examination would be rendered nearly valueless. The ruling as to numbers went no further than this, that each party might put six witnesses on the stand, to speak to the credibility of the person sought to be impeached. But when on the stand, the right of examination and cross-examination should not be infringed.

Give the ruling the effect claimed for it, and it would deprive the party against whom the witness was called of a substantial right—a right to test the capacity, integrity and means of knowledge possessed by the witness, by a cross-examination. The defendant was therefore entitled to the same right of cross-examination as if no ruling had been made in regard to the number of witnesses on the subject of impeachment; otherwise the limitation would be itself improper, inasmuch as it would deprive the party against whom the witness was called, of a right always deemed of the utmost consequence—a right of full and searching cross-examination. In my judgment, the cross-examination was here improperly abridged.

In conclusion, it may be remarked, that when a case is

sought to be established by the testimony of an accomplice, who stands in the main, if not wholly uncorroborated, it is due to the party accused and to the cause of justice, that none but evidence clearly admissible under the severest test should be allowed; and that none in the least bearing on the question of credibility, and admissible, should be excluded. Mr. Justice Beardsley well remarked, in *The People* v. *White*, (14 *Wend.* 114,) that "when the case is one of delicacy and importance, and the evidence is nicely balanced, and the scale liable to be affected by slight circumstances, the court will be exceedingly vigilant in preventing any extraneous or irrelevant matter from being brought before the jury." The same may also be said in regard to the rejection of evidence which it was the right of the party to lay before the jury for their consideration.

Now, in this case, the only direct evidence of guilt was given by a confederate in the crime. The witness was a conceded felon. The evidence on which the conviction was predicated came from a source admittedly corrupt. The case before the jury was, therefore, one of extreme delicacy, and the accused had the right to insist that it should be considered by them without possible error in the admission or rejection of evidence, tested by the strictest rules.

The charge of the learned judge who presided at the trial was eminently fair and impartial. The law of the case was clearly and explicitly stated, and his comments on the evidence were unexceptionable. In this regard the defendant has no cause for complaint. But, for the reasons above suggested, the verdict must be set aside, and a new trial ordered.*

[SCHENECTADY GENERAL TERM, January 5, 1869. *James*, *Rosekrans*, *Potter* and *Bockes*, Justices.]

* The defendant was acquitted, upon the new trial.

CADY and others *vs.* P. POTTER and the Executors of Colba Reed.

If, in an action of interpleader, the property in dispute is definite and certain in character, this is sufficient. Its exact value is wholly immaterial.

Thus, where the interpleader was to determine the rights of the defendants in fixed and definite property, to wit, twenty shares of the capital stock of a bank, to which twenty shares of stock neither the bank nor its officers made any claim whatever; *Held* that there was no force in the objection that the subject of the controversy was not definite and fixed in amount.

An interpleader will be sustained where it is necessary for the protection of a person from whom several others claim, legally or equitably, the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter.

The fact that the bank has recognized one of the defendants as the owner of the stock and paid him dividends thereon, binds it to nothing in the future; nor does it either improve or injure the rights of such defendant, in regard to the property. It only shows that in some instances the bank officers yielded to the demands and importunities of such defendant. Such action is not inconsistent with the averment in the complaint, of indifference between the defendants; nor does it contain any element of estoppel.

Although it is the well settled rule that a court of equity may reform a written contract upon parol evidence of a mistake; yet this can be done only in an action between the parties to the contract, or their privies.

A contract cannot be reformed in a collateral action, by persons not parties to such contract nor claiming under a party thereto in privity.

Where the demand for a reformation of a contract comes from neither of the parties to the instrument, or any one claiming under them, in privity, but from the personal representatives of a third party, claiming under an illegal prior transfer, parol evidence to show what the contract was, and that an important part was omitted from the written instrument, is inadmissible.

A *bona fide* assignee of bank stock, with the first valid transfer thereof on the books of the bank, who takes his assignment without notice of a previous assignment not entered on the transfer book, has a prior and better right to such stock than the previous assignee. And a cancellation of the transfer to him, by the officers of the bank, made without his knowledge or consent, is unauthorized, and of no effect.

THIS is an action of interpleader, brought by the representatives of the Schenectady Bank, to settle and determine the rights of the defendants to twenty shares of the capital stock of said bank.

The facts of the case are as follows: Prior to and on

the 1st of February, 1859, John Reed was a stockholder in the Schenectady Bank, holding a scrip certificate for twenty shares of its capital stock. On that day, and in consideration of $1000, then paid him by Colba Reed, his father, he executed to the latter an assignment of such stock, indorsed on the back of the scrip, and delivered the same to Colba; but no transfer to the latter was entered upon the books of the bank, nor were its officers notified of the assignment until December 20th, next following.

On the 28th April, 1859, John Reed, being the maker of a note for $6327.77, past due, held by the bank, and indorsed by the defendant Potter, and with a view to obtain a renewal of such indorsement, transferred to said Potter, or assumed so to do, the twenty shares of stock and the usual formal entry in the transfer book of the bank was made.

The scrip certificate for the stock issued to John Reed was then in the possession of Colba Reed, and was not present. But Potter had no knowledge or information of the previous assignment to Colba Reed on the back of the scrip, and indorsed the new note on the faith and pledge of the stock as security. This new note was given temporarily, and on the 30th June, John Reed made three other notes in renewal, which were indorsed by Potter, viz., one for $1002.49, payable in ten days; one for $1401.60, payable in four months; one for $4132.30, payable in six months. The first was paid by the maker, Reed, prior to the cancellation of the transfer to Potter, hereafter mentioned, and the latter was charged as indorser upon the other two, and he paid the second before the commencement of this action.

On the 20th December, 1859, Colba Reed presented the scrip certificate for the stock, with the assignment to him of February 1st indorsed, and procured in virtue thereof a transfer of the stock, to be made to himself, on the transfer book of the bank—the prior transfer to Potter having

been erased by the president, but without Potter's knowledge or consent. The bank, in June, 1860, paid Colba Reed a dividend on the stock. Both Potter and Colba Reed claimed the stock, and the right to it is still in dispute between the former and the executors of the latter.

The assignment of the stock to Potter declared, on its face, that it was made as collateral security for indorsing note of April 30, 1869.

The executors of Colba Reed, in their answer, set up that such assignment was in fact intended by the parties only as a transfer as security for $1000 of such note, which sum had been fully paid, and charged that the expression of such purpose and intention was omitted from the instrument by mistake and inadvertence; and they asked that the instrument might be reformed, so as correctly and fully to express the agreement between the parties. On the trial they offered to prove such inadvertent omission, and the offer being objected to, was excluded.

Judgment was awarded in favor of Potter, and from such judgment the executors of Colba Reed appealed.

E. W. Paige, for the plaintiffs.

Henry Smith, for the executors.

S. W. Jackson, for the defendant Potter.

By the Court, Bockes, J. There is no force in the objection taken on the trial and again urged on the appeal, that the subject of the controversy was not definite and fixed in amount. The interpleader was to determine the rights of the defendants in fixed and definite property, to wit, twenty shares of the capital stock of the bank, to which twenty shares of stock neither the bank nor its officers made any claim whatever. The property in dispute was definite and certain in character, and its exact value

was wholly immaterial. An interpleader will be sustained where it is necessary for the protection of a person from whom several persons claim, legally or equitably the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. It may be suggested in this case, however, that the real value of the shares in dispute was shown by the cashier of the bank to be in fact $750. He testified that the plaintiffs were ready to pay to the party entitled thereto the assets represented by this stock, the proceeds of which was $750. It may be repeated that neither the bank nor its officers claim the stock, or the assets represented by it, or any beneficial interest therein. The plaintiffs' position is one of entire indifference as regards the subject of controversy between the defendants. The objection that the subject of the interpleader was not definite and fixed, was therefore properly overruled. Nor was there error in the refusal to dismiss the complaint on the ground that the bank recognized Colba Reed as the owner of the stock, and paid him dividends thereon. This action of the bank bound them to nothing in the future; nor did it either improve or injure the rights of Colba Reed in regard to the property. It only showed that in some instances the bank officers yielded to the demands and importunities of Reed; but such action was not inconsistent with the averment of indifference between the defendants; nor did it contain any element of estoppel.

The principal question in the case seems to be that arising on the refusal of the court to admit evidence to show that the agreement between John Reed and the defendant Potter was, that the stock should be assigned as collateral security for the payment of $1000, and that this agreement was omitted from the written assignment through mistake and inadvertence. It is undoubtedly the well settled rule that a court of equity may reform a written contract upon parol evidence of the mistake; but this can be done only

in an action between the parties to the contract or their privies. Judge Story says that, in all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity. The decision of the learned judge was undoubtedly put on the ground that the reformation of the instrument was here sought in a collateral action, by persons not parties to the contract nor claiming under a party thereto in privity. I think the decision correct. Reed was not a party in his own right—nor did he appear or answer as a party in his own right—but simply as one of the executors of the last will and testament of Colby Reed, deceased. The interpleader did not involve him individually, or his personal rights, in any way, but raised a question only between the estate of Colby Reed and the defendant Potter. It was not competent to reform the instrument made between John Reed and Potter in this action, at least until the former was brought in or made a party. It was not sufficient that he was in the record as executor; for as such he only represented the estate of the testator. As is truly said by the respondents' counsel, the demand for a reformation of the contract comes from neither of the parties to the instrument, or any one claiming under them, in privity, but from the personal representatives of a third party claiming under an illegal prior transfer. The evidence offered was properly excluded.

As regards the cancellation of the transfer of the stock from John Reed to Potter, by the president of the bank, all that need be said is, that it became a question of fact whether or not such cancellation was with his knowledge and consent. The learned judge, on all the evidence, found in Potter's favor on that question, and as a consequence that the cancellation was unauthorized and of no effect. In this aspect of the case, and with the additional fact, which is uncontroverted, that Potter was a *bona fide*

assignee of the stock, with the first valid transfer thereof on the books of the bank, his prior and better right to it was beyond dispute. On this point the decision in *N. Y. and N. H. Railroad Co.* v. *Schuyler* (34 *N. Y. Rep.* 30) is emphatic and conclusive. (*See remarks of Davis, J., on page* 80.)

There are some other objections and grounds of error noted in the appellants' brief and points, but none of them, it is believed, are of sufficient importance to require particular comment.

The judgment appealed from should be affirmed, with costs of appeal against the appellants.

[SARATOGA GENERAL TERM, November 1, 1869. *Rosekrans, James* and *Bockes*, Justices.]

55b 463
150a 322

BACKMAN *vs.* JENKS.

In an action upon promissory notes, the consideration of which was liquors sold by the plaintiff to the defendant, it was proved that the liquors were obtained on the defendant's orders, given by him at his hotel in Vermont, through the plaintiff's agent, who was traveling to solicit orders, but had no right to sell liquors. The orders were given at the defendant's hotel, where the price and amount were fixed; which orders the agent would forward to the plaintiff, in New York, who would fill and ship them, as directed by the defendant. *Held* that the transaction had no binding force until the order for liquors was filled in New York, when, and not before, it had legal existence and vitality. And that therefore the contract was, by legal construction, made in New York, to be performed, and in fact performed there, (except as to payment,) and not in Vermont, and was governed as to its validity, by the laws of the former State.

Accordingly *held* that an action upon the notes could be maintained, in this State, notwithstanding the consideration for which they were given was the sale and delivery of spirituous liquors, in violation of the statute of Vermont.

Held, also, that even if it had appeared that *payment* was to be made in Vermont, that fact would not alter the case.

Where a plaintiff wishes to dispute the facts alleged by the defendant and assumed by the court, upon a motion for a nonsuit, it is not necessary, in

order to present the question on appeal, that the plaintiff should request to have the question, whether such are the facts, submitted to the jury. An exception to the ruling, on a motion for a nonsuit, is sufficient to raise the point of error that the case should have been submitted to the jury.

THIS action was brought against the defendant as maker of two promissory notes, one for $364.62, at one day from date, the other for $100, at four months, both dated September 5, 1860. The notes were given in renewal of other notes, the consideration of which was liquors sold by the plaintiff to the defendant. The defendant was a hotel-keeper, and a resident of the State of Vermont, at the time of the purchase of the liquors, and has continued a resident of that State ever since. The plaintiff is a resident of the State of New York. The defendant interposed as a defense the statute of limitations. Also that the original consideration of the notes was the sale and delivery of spirituous liquors, in violation of the statute of the State of Vermont. It appeared, on the trial, that the liquors were purchased in 1854 or 1855, and it was conceded that if the contract of sale was made and to be performed in the State of Vermont, it was in violation of the statute of that State, and void.

It was proved that the liquors were obtained on the defendant's orders, given by him at his hotel in Vermont, through the plaintiff's agent. The agent testified that he was the traveling agent for the plaintiff to solicit orders, but had no right to sell liquors; that the defendant gave him the orders at the defendant's hotel, where the price and amount were fixed; which orders he would forward to the plaintiff, in New York, and the latter would fill them. The defendant directed how they should be shipped. The defendant testified the same, in substance. He said the liquors were to be sent from New York to him by railroad or by steamboat, and were so sent, marked, Diamond "I," and that he paid the freight; that the agent took a minute, in his book, of the amount and kinds of

liquor he wanted sent. He added that some of it was delivered at Granville, N. Y., and some at Pawlet, Vermont.

At the close of the evidence, the defendant's counsel moved for a nonsuit, on the ground that the consideration of the notes in suit was liquors sold by the plaintiff to the defendant contrary to the statutes of Vermont, and that no action could be maintained thereon. The court granted the motion, and the plaintiff excepted. Judgment being entered pursuant to such decision, the plaintiff appealed to the general term.

A. S. Benedict and *E. Cowen*, for the appellant.

O. F. Thompson, for the respondent.

By the Court, Bockes, J. The statute of Vermont, on which the defense in this case rested, declared that no action should be had or maintained, in any court of that state, for the recovery or possession of intoxicating liquors, or the value thereof, except such as was sold or purchased in accordance with its provisions; and it must be conceded that if the contract of sale which constituted the original consideration of the notes in suit was made in Vermont, and was there to be performed, the transaction was illegal and void, and gave no right of action, there or elsewhere. The nonsuit was granted on the hypothesis that the case proved came within the operation of this rule. It is contended, however, that the contract of sale was not made, nor was it to be performed, in the State of Vermont. If this view can be maintained, the nonsuit was erroneous, and the judgment should be reversed. We are therefore first to inquire where was the contract of sale made? It is made to appear by the proof that the first step in the matter of the contract was in Vermont, and where the defendant gave orders on the plaintiff, through his agent, for the liquors, to be forwarded to him at a price then

fixed and in a manner then specified. The authority of the agent was, as he swears, to solicit orders; not to make sales; and he received the orders given by the defendant, and forwarded them to the plaintiff in New York, to be filled. Suppose the orders had been in writing, instead of verbally through the agent; the case would have been in no respect different in its legal bearings. Take, for example, a single instance. The order, according to the form adopted, would have been a request on the plaintiff, doing business in New York, to send the defendant a specified quantity of liquor at a price named, to be directed to him in Vermont, and forwarded in a way particularly pointed out. This request would not, of itself, constitute a contract; nor would there be a contract of sale of the property mentioned in it, until accepted and filled by a delivery according to its terms. The transaction had no binding force until the order or request was filled in New York. Then it had legal existence and vitality. By legal construction, therefore, the contract was made in New York; not in Vermont, and was performed there, too, (except as to payment;) for the property, on due delivery on the railroad or steamboat, as directed, became the property of the defendant, subject only to the plaintiff's right of stoppage *in transitu*. The case is similar, in all its principal features, to *Hyde* v. *Goodnow*, (3 *N. Y. Rep.* 266,) as will be seen by the head-note, as follows: "A mutual fire insurance company had an agent residing in the State of Ohio, authorized to receive applications for insurance. The agent received, from a party also residing in Ohio, an application, together with a premium note of the applicant, and transmitted them to the office of the company, in this State, where they were received, passed upon and approved, and where a policy was executed and transmitted to the applicant, by mail. The agent had no authority to make insurances. In an action to recover the premium note, *held* that the contract was made in the

State of New York, at the office of the company, and not in the State of Ohio; and therefore that the contract was not within the prohibition of the statute of that State, declaring that 'no policy of insurance shall be signed, issued or delivered' in that State by any company not chartered by the laws thereof, except by an agent of such company who should first have obtained a license in manner prescribed by the act." This decision is directly in point, and is controlling of the case under examination.

The case of *Western* v. *The Genesee Mu. Ins. Co.* (12 *N. Y. Rep.* 258) is, on its face, very much like that cited. In the latter case, it was also held that the contract was made and was to be performed in the State of New York; and that its validity depended upon the laws of that State. Justice JOHNSON says: "The contract was consummated by the final assent on the part of the company, and upon that event, and not upon its delivery to the assured, became operative. The validity of the contract is therefore to be determined by the law of New York. Here it was made, and here it was to be performed."

It was suggested on the argument, by the respondent's counsel, that it was of some importance that payment was to be made in Vermont. It does not, however, appear from the case that payment was to be made there. But suppose it had so appeared; that fact would not change the case. This was considered in *Hyde* v. *Goodnow*, where it was said that it was immaterial where the payment was to be made. If the sale was not within the prohibition of the statute, the place of payment could not vitiate the transaction.

Now, in the case under consideration, the evidence shows that the contract was made and consummated in New York. An order, request or proposition, was sent from Vermont for the property; but no contract existed until it was received and met by an acceptance in New

York, where it was also to be performed, and where it was in fact performed.

But, in any event, even admit what I deem contrary to the fact—that the evidence does not, as a matter of absolute certainty, show that the contract was made and was to be performed in New York—certainly there was sufficient to raise a question for the jury, in that regard; and in that view of the case, the nonsuit was improper. Nor was it necessary, in order to present the question on appeal, that the plaintiff should have requested the court to submit the cause to the jury. I thought otherwise, on the argument, but find the point expressly decided in *Sheldon* v. *The Atlantic Fire and Marine Ins. Co.*, (26 *N. Y. Rep.* 460.) The question arose, in the case cited, in precisely the same manner as in this. No request to submit the case to the jury on the facts was made, but it stood on the exception to the ruling of the court in granting the motion for a nonsuit. The counsel in that case contended that if the plaintiff wished to dispute the facts alleged by the defendants, and assumed by the court upon the motion for nonsuit, they should not only have resisted the motion and excepted to its being granted, but, in addition, should have expressly requested to have the question whether such were the facts submitted to the jury. It was otherwise decided; the court holding that the exception to the ruling on the motion for a nonsuit, where the judge assumed to pass on both questions of law and fact, was sufficient to raise the point of error that the case should have been submitted to the jury.

The nonsuit was erroneously granted, and the judgment must be reversed.

Judgment reversed, and new trial ordered; costs to abide the event.

[SARATOGA GENERAL TERM, November 1, 1869. *Rosekrans, Potter* and *Bockes*, Justices.]

KREITZ *vs.* FROST.

The practice which was prescribed by the Revised Statutes, prior to the Code of Procedure, requiring the clerk to assess the plaintiff's damages on default, demurrer, or confession, in certain specified cases—leaving the damages, in all other cases of default, to be ascertained by a sheriff's jury, upon a writ of inquiry—is substantially continued by the Code; only that in cases where the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, the court may, in its discretion, order a reference for that purpose.

In an equity suit, however, a writ of inquiry was never ordered; and a sheriff's jury would have no jurisdiction to assess damages.

Hence an order allowing a writ of inquiry, to have the damages assessed by a sheriff's jury, in an equity case, although it be entered on the consent of the defendant's attorney, is altogether null and void, since the Code. In such a case a reference is proper.

Costs, in equity actions, are not a matter of course, but were always in the discretion of the court. Consequently, to entitle either party to them, it was, under the former system, necessary that the court should expressly allow them. This rule is continued, under the Code of Procedure.

APPEAL from an order made at a special term, in an equity case.

CLERKE, P. J. I. The practice which was prescribed by statute (2 *R. S.* 280, *mar.*) before the adoption of the Code of Procedure, required the clerk to assess the plaintiff's damages on default, demurrer, or confession, in the following specified cases: On bills of exchange, promissory notes and orders, or drafts for the payment of money; on contracts for the absolute payment of money only; on contracts for the payment of a sum certain, though payable in specific articles; or on contracts for the delivery of specific articles at a value or price specified in the contract. In all other cases of default (embracing all cases where the action sounds in damages, and the damages are not a mere matter of calculation) the only mode of ascertaining them was by a writ of inquiry, directing the damages to be assessed by a sheriff's jury. This practice, I think, is substantially continued by the Code of Proce-

dure; only that in cases where the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, the court may in its discretion order a reference for that purpose.

In an equity suit, however, a writ of inquiry was never ordered; and a sheriff's jury would have no jurisdiction to assess damages. If the court required information on any subject, it sent the case to a court of common law on a *feigned issue*, to be submitted to a jury regularly summoned and impanneled before a judge, sitting at *nisi prius*. So that the order of the 24th of November, 1868, allowing a writ of inquiry, to have the alleged damages assessed by a sheriff's jury, although with the consent of the defendant's attorney, was, I am inclined to think, altogether null and void. In such a case a reference would have been proper.

II. The damages allowed by the sheriff's jury were excessive. I do not find any proof in the papers, that the plaintiff had paid the amount claimed by his lawyer for examining the title in question. His mere liability for such a claim would be scarcely sufficient to sustain a demand for unliquidated damages. At all events, the amount given by the jury was much too large. At most, the defendant was only liable for the expense of examining the title; and for this, eighty dollars, besides disbursements, would be an abundant compensation. I think that the rate established by the bar in Kings county, and adopted by Wetmore & Bowne, is reasonable.

III. This being an equity suit, costs to the plaintiff were not a matter of course. Costs in such actions were, always, in the discretion of the court; and, consequently, to entitle either party to them, it was necessary that the court should expressly allow them. This rule is continued by the Code of Procedure, (§ 306.)

The order should be affirmed, with costs.

CARDOZO, J. I concur; without, however, expressing any opinion as to what would be a reasonable amount of damages.

SUTHERLAND, J. I concur in affirming the order, with costs.

Order affirmed

[NEW YORK GENERAL TERM, November 1, 1869. *Clerke, Sutherland* and *Cardozo*, Justices.]

SPATZ *vs.* LYONS.

Although, in an action to recover damages for injuries inflicted on the plaintiff's wife, by the defendant, which caused her death, a statement made by the wife to the plaintiff, respecting the assault, immediately after it occurred, might be admissible in evidence, as part of the *res gestæ*, to show who the person was that committed the assault, yet a conversation held with the plaintiff by the wife, the next day, cannot be received. BRADY, J., dissented.

Nor is such a statement admissible as the dying declarations of the deceased; such declarations being admissible only in cases of trial for the homicide of the person making them, and then only where the person was acting under a full conviction that the wound was mortal, and that death would speedily ensue.

It is not sufficient ground for admitting hearsay evidence, for such a purpose, that it is a matter of necessity, because no other proof can be procured.

Hence it cannot be received on the ground of necessity, in an action for a personal injury, to prove an assault committed a short time previous, even though the party assaulted has since died.

A judge, at the trial, may entertain a motion for a new trial, on his minutes, either on exceptions or for insufficient evidence, or for excessive damages. If for either of these reasons he is satisfied that he erred on the trial, it is his duty to grant the motion.

Whatever would be a sufficient ground for setting aside a verdict, will justify an order granting a motion for a new trial.

The case of *Goodwin* v. *Hanson* (1 *Root*, 80) disapproved.

THIS action was brought to recover damages for injuries alleged to have been inflicted on the plaintiff's wife by the defendant, which caused her death.

Upon the trial of the cause, the statement made by the wife to the plaintiff, after she had returned to her home, was offered in evidence. This evidence was admitted to show who the person was that committed the assault; and the conversation as to the defendant was on the day after the assault. The admission of the evidence was excepted to by the defendant.

The defendant moved for a dismissal of the complaint, which was refused, and the case was submitted to the jury, who found for the plaintiff. Afterwards the defendant moved for a new trial on the judge's minutes, and the same was granted. From this order the plaintiff appealed.

Wm. L. Headley, for the appellant.

Crooke & Bergen, for the respondent.

INGRAHAM, P. J. The decision of this appeal necessarily involves the validity of the exceptions taken on the trial. No cause is assigned by the justice for granting a new trial, and whatever would have been a sufficient ground for setting aside the verdict would justify the order appealed from.

Had the evidence objected to been a conversation with the deceased immediately after the occurrence, it might have been admissible as part of the *res gestæ*. Even such conversations have been held inadmissible by some judges; but I know of no case in which conversations held the next day, with the injured party, have ever been received.

The judge appears to have admitted it under the authority of *Goodwin* v. *Hamson*, (1 *Root*, 80;) but that case has not been sanctioned by our courts. The propriety of that ruling is not attempted to be sustained by the plaintiff's counsel, in his points. It was not admissible as part of the *res gestæ*, because it did not take place either at the time of the supposed injury or immediately after. In fact

it was not until the next day, when the plaintiff and his wife had been out in search of the person upon whom to charge the assault; and this statement was made after they had seen the defendant. Nor was it admissible as the dying declarations of the deceased, because such declarations are only admissible in cases of trial for the homicide of the party making them, and then only where the person was acting under a full conviction that the wound was mortal, and that death would speedily ensue.

The ground suggested, that it was a matter of necessity, because no other proof could be procured, has never yet been considered in this State a sufficient ground for admitting hearsay evidence for such a purpose as this. It is admissible in cases of pedigree, and for proving matters connected with titles to land of a period anterior to that of any living witnesses, but that rule would not sanction its admission from necessity, in an action to prove an assault committed a short time previous, even though the party assaulted had since died.

It is urged on the part of the plaintiff that as the justice refused to dismiss the complaint on the trial, therefore he should not have set aside the verdict as against evidence. It does not appear from the case on what ground the motion was granted. He may entertain such a motion on his minutes, either on exceptions, or for insufficient evidence, or for excessive damages. If for either of these reasons he is satisfied that he erred on the trial, it is his duty to grant the motion.

I think it very clear that the evidence of the wife's declarations should not have been admitted; that the judge should have stricken out that evidence when so requested; that there was no other evidence on which the verdict could be sustained; and that the verdict was properly set aside and a new trial ordered.

The order appealed from should be affirmed, with costs.

GEO. G. BARNARD, J. I concur, upon the following authority: *Gray* v. *Goodrich*, (7 *John.* 95.)

BRADY, J., (dissenting.) The evidence on the part of the plaintiff shows that his wife came home ill; that she complained of an assault having been committed upon her by a man who had around him several dogs; that her person exhibited signs of injury, and that she complained of the injury received; that she gave an account, in detail, of the occurrence, describing the offender as a man with dogs who had assaulted her; that she then, at her husband's request, after a little while, went out with him to find the man; that they went to the place at which the assault had been perpetrated; that there were evidences of a struggle there, and that they found the defendant within three hundred feet from the place, with his dogs, whom she at once identified as the person by whom she had been injured. This testimony, so far as it embraces the declarations of the plaintiff's wife in the account of the occurrence and the recognition of the defendant by her, were, in my judgment, within the exception to the rule against hearsay evidence, as a part of the *res gestæ*, from the necessity of the case. In case for giving the plaintiff a dose to intoxicate and inflame her passions, her declarations the next morning after the dose was administered, made to the mother, were held to be admissible, but as an exception to the rule. (*Goodwin* v. *Hamson*, 1 *Root*, 80.) That decision is cited in *Cowen & Hill's Notes on Phil. Ev.* (*vol.* 2, *p.* 587,) and not questioned. In *Thompson and wife* v. *Trevanion*, (*Skin. Rep.* 402,) which was an action for injuries to the wife, Ch. J. Holt allowed what was said by her immediately upon the hurt, and before she had time to devise or contrive anything for her own advantage, to be given in evidence. That case was cited with approbation by Lord Ellenborough, in *Avison* v. *Ld. Kinnaird*, (6 *East*, 194,) and is referred to in the text in

Phillips, 232. In these cases the evidence was no doubt admitted from necessity, and from its being within the rule that concomitant declarations may be received as a part of the occurrence to which they relate. (1 *Greenl. Ev.* § 110.) A similar exception to a well established rule, founded upon necessity, prevails in actions for divorce, and which allows the wife to prove the violence of the husband, where no one was present.

The plaintiff's wife died on the 25th January, 1867, at which time she could not have been a witness for her husband—a disability which was not removed until after her death, and on the 10th May, 1867. (*Laws of* 1867, *vol.* 2, *p.* 2221.) The statement of the plaintiff's wife was made within a few minutes after she came home, and a short time after the assault, and before she had time to devise or contrive anything for her own advantage. It was concomitant with the occurrence, therefore, in legal contemplation. (*Cases supra.*) The same observation applies to the identification of the defendant as the wrongdoer. She went in search of him and found him, on the day of the assault, at the place designated. There is no doubt of this, on the testimony. The plaintiff said, on cross-examination, "I was sure about what my wife tell me—that is the dogs and that is the man; that is why I wanted him to come over to my house;" which the defendant did do, *the next day*.

The necessity out of which this exception to the rule arose existed in this case. The wife could not be a witness, and for aught that appears, no one was present when the assault was made. The evidence in the case, aside from her declarations, was sufficient to show that she had been injured, and by some unusual circumstance, and the charge against the defendant derived support from his conduct and character. He gave a false name to the plaintiff, and falsely stated his place of residence, and when found was surrounded by his dogs, which strength-

ened the truthfulness of the wife's story and identification. The presiding justice, in submitting the case to the jury, told them they must be satisfied from other evidence in the case than the wife's statements when she came home, of the defendant's liability, and that upon the mere allegation of a woman out of court, and not under oath, a man was not to be found guilty, nor adjudged to pay damages.

The cases to which we were referred by the defendant's counsel, on the argument, are entirely different from this case, and are authorities only upon the general rule as to hearsay declarations and declarations *in extremis*. This case, and the cases which have been cited, rest not on the rule, but the exception to it. I think the whole subject was properly left to the jury; that the verdict should not be disturbed, and that the judgment should be affirmed.

Order appealed from affirmed.

[New York General Term, January 8, 1870. *Ingraham, Geo. G. Barnard* and *Brady*, Justices.]

Patrick Cuff *vs.* Jane A. Dorland.

Where an agreement for the sale and purchase of land was very imperfect in its character, binding the vendor to sell the property at a fixed price, to be paid in installments to suit the purchaser; $5000 on delivery of the deed, and the balance at future periods, without providing for any mortgage or security for the purchase money, and without any time being fixed for the completion of the contract; and such agreement was drawn by the purchaser, to be signed by the vendor, a female, not versed in such matters, in the absence of any legal adviser, when she had been for a long time an invalid, confined to the house by sickness, in embarrassed circumstances, and urged to execute it by the purchaser; and she signed the same under a misapprehension of its contents, as to the terms of payment, supposing that the whole purchase money was to be paid in cash, instead of in installments at different periods; *Held* that the nature of the agreement, and the circumstances under which it was procured, fully justified a decision by the justice, at the trial, refusing to decree a specific performance.

Held, also, that the terms of the agreement were not fair and just, and the circumstances under which it was executed were such as to render it very doubtful whether it was understood by the vendor, in such a way as to make a valid contract on her part, or at any rate, not so clearly so as to call for a decree of specific performance, even though no intended deception or fraud were imputed to the purchaser.

The rule is now well settled, that in actions brought for equitable relief, and tried before a judge, if there appears to be no ground for granting such relief, the court should retain the cause, and grant such legal relief as may be just.

Hence, although a judge refuses to decree a specific performance of a contract of sale, at the suit of the purchaser, yet he should retain the case for the purpose of awarding to he plaintiff the damages he is entitled to, for the non-performance.

APPEAL by the plaintiff from a judgment rendered at a special term, on a trial before Justice CLERKE, without a jury.

The action was brought for the specific performance of an agreement for the sale of real estate, which was as follows:

"For and in consideration of the sum of fifty dollars, paid to me in hand, Jane A. Dorland, of the city of New York, have sold to Patrick Cuff, of same place, all that lot of land situated and lying in the twenty-second ward of this city, known as follows: On the southeast corner of Fifty-fifth street and Eighth avenue, more or less, say seventy feet on Eighth avenue, and one hundred feet on Fifty-fifth street, for the sum of fifteen thousand five hundred dollars, ($15,500,) to be paid in installments to suit purchaser; say five thousand dollars on the delivery of deed, the balance to be paid in sums not more than two thousand five hundred dollars annually, until the same shall be paid in full, of ten thousand five hundred dollars.

New York, February 21st, 1866.

Signed in the presence of

Jane C. Dorland. JANE A. DORLAND."

Acknowledged April 2, 1866.

The answer of the defendant alleged that the written instrument did not express her understanding of the agree-

ment, and that it was signed under a misconception of its contents, and was never acknowledged by her or proved by a subscribing witness, and that the recording of the same and the whole transaction was a gross fraud upon her. The answer also set up that the defendant was much embarrassed and in need of a sum of money in cash, and that the plaintiff knowing this fact, applied to her to become a purchaser of the lots; and by offering to assist and befriend her, and immediately to pay off some pressing liens upon her property, and by manifesting a deep personal interest in her behalf, induced her to sell the lots to him at a price less than she was then offered for them and could then sell them for. The answer further alleged, that immediately upon her having agreed to sell, the plaintiff drew up the contract, and she, without any opportunity to see her counsel, and being in feeble health and without advice or assistance, and relying on the plaintiff, signed the paper. That having obtained the contract the plaintiff failed to do as he had promised; did not pay off the incumbrances; and some of the property referred to in the answer was ordered to be sold in a foreclosure suit, and one portion was actually sold, and that she was put to great expense in procuring from other sources the money which her necessities demanded.

The following facts were found by the justice before whom the action was tried:

1. That on the 21st day of February, 1866, the defendant, being the owner of the three lots of land mentioned in the complaint, was induced by the plaintiff to execute a contract prepared by him, whereby she undertook to sell the said lots to him on the following terms, to wit, "for the sum of fifteen thousand five hundred dollars, to be paid by installments to suit the purchaser; say five thousand dollars on the delivery of the deed, the balance to be paid in sums not more than $2500 annually, until the same should be paid in full, of $10,500."

2. The defendant had been confined to her house an invalid for many years, living with no male friends or relatives, holding no intercourse with the world, in embarrassed circumstances, and depressed in mind, and executed the said contract by the inducement of the plaintiff on the spot, without deliberation, or consulting any friend or legal adviser.

3. The defendant signed the said contract under a *bona fide* misapprehension in a material point; as she understood that the whole purchase money was to be paid in cash, and supposed that the contract so stated.

4. That on the 14th day of July, 1866, the defendant entered into a contract, in writing, for the sale of said premises, with one Philip Fitzpatrick; that said agreement was executed after the commencement of this action, and after the filing of notice of pendency thereof in the office of the clerk of the city and county of New York, and made subject to the final result of this action.

5. That the plaintiff, in part performance of said agreement, paid to the defendant the said sum of $50, mentioned therein, which sum the said defendant accepted, and that at divers times after the execution and delivery of said agreement, and before the 13th day of June, 1866, the plaintiff, in part performance thereof, and at the request of the defendant, paid to her and to divers persons, for and on account of said defendant, divers sums of money, in all amounting to the sum of $377, exclusive of said sum of $50 paid to her on the delivery of said agreement; no part of which said sums of money the defendant has paid back, or offered to pay back, to the plaintiff.

The justice found the following as conclusions of law:

First. The contract which the plaintiff induced the defendant to sign is so objectionable in its terms, and in the circumstances under which it was procured, that a court of equity will not lend its peculiar and extraordinary jurisdiction to enforce it.

Second. That the defendant was entitled to have the complaint dismissed.

And judgment of dismissal, without costs, being entered, the plaintiff appealed

F. Smyth, for the appellant. I. There is no allegation, in the answer, of incompetency on the part of the defendant to make the contract in question, nor is there any proof to that effect.

II. Nor is there any allegation of inadequacy of price, nor any proof of inadequacy. Indeed the testimony shows the price to have been fair and reasonable.

III. Nor is there any allegation of fraud, misrepresentation or deception of any kind; and the testimony shows the very reverse.

IV. The only defense set up in the answer, or relied on by the defendant, is "that the agreement did not contain or express her understanding with the plaintiff, and was signed by her under an entire misconception of its contents and character;" which "misconception" as it appears by the course taken by the defendant on the trial consisted in a "mistake" in the contract, in not stating that the whole price was to be paid in cash, instead of part, viz., $5000 in cash, and the residue in subsequent payments. The averment and the defense substantially are, that the contract was signed by the defendant by mistake, and the mistake being in the particular just mentioned. 1. The testimony does not show any mistake, but the contrary. (*a.*) The defendant acknowledged the execution of the contract before a commissioner, the 2d of April, 1866. (*b.*) She repeatedly received payments on it from the plaintiff. (*c.*) She requested the plaintiff to pay in cash, as a favor, $3500 beyond the $5000 stipulated in the contract; and she was aware of the efforts made, and of the expense incurred by him in endeavors to obtain the money. (*d.*) In performance of the contract she tendered him a

deed; although the tender was not effective as a legal tender, (as appears by the testimony,) still it is a most solemn and unequivocal admission by the defendant that the contract was not invalid by reason of mistake or otherwise. (*e.*) These repeated acts of part performance by the plaintiff, and acceptance by the defendant, preclude her from the defense she sets up. (*f.*) It is fully proved that the agreement was read to the defendant before she signed it; her intelligence and intellectual capacity are not denied; it cannot be, then, that she was under any "mistake." (*g.*) In her agreement with Fitzpatrick she makes that agreement subject to this. 2. The alleged mistake, if it existed, was not material; whether the $10,500 was to be paid in cash, or in future installments of $2500 each, secured on the premises, was not a matter of sufficient importance to render null the contract on the ground of mistake, even if it were clearly shown that the defendant signed it under a mistake in this particular. 3. A contract cannot be set aside on the ground of mistake merely, (as attempted in this case,) unless the mistake is mutual—the mistake of both parties. A party alleging mistake in a contract must show it, and make it out clearly and by satisfactory proofs. He must also show that the part omitted or inserted was omitted or inserted contrary to the intent of both parties, or under a mutual mistake. (*Nevins* v. *Dunlap*, 33 *N. Y. Rep.* 676, *and cases cited.* 1 *Story's Eq.* §§ 146, 152, 153, 157. *Parks* v. *Johnson*, 4 *Allen's* [*Mass.*] *Rep.* 259. *Lanier* v. *Wyman*, 5 *Rob.* 147.)

V. The plaintiff, in all respects, performed on his part; indeed it is not pretended in the answer that he did not perform or duly tender performance of the contract stated in the complaint. The only allegation is that he did not perform another and a different contract—one which he never entered into.

VI. The proof shows that the contract was in all respects fairly and intelligently entered into by the defendant. In-

deed the judge says: "There was no unfairness on the plaintiff's part; he was rather solicited to buy; he acted in a very fair, candid and open way."

VII. The contract sought to be enforced is in writing, being certain in its terms and fair in all its parts, and for an adequate consideration, and capable of being performed. The plaintiff was entitled to a decree in his favor. (*Story's Eq.* § 751, *ed. of* 1866.) And although a decree for specific performance is within the discretion of the court, it is not an arbitrary discretion, but a discretion regulated by the principles which have been established by the decisions, and in a case coming within these the court is bound to decree specific performance. (*Bowen* v. *Irish Presb. Church*, 6 *Bosw.* 245, 268. *Hall* v. *Warren*, 9 *Vesey*, 608.) There would be no safety in written contracts of any kind, if this defendant can relieve herself of this contract under the pleadings and proofs in this action.

VIII. Time was not of the essence of the contract in question; and even if it was, equity would enforce it in many cases. (*Stevenson* v. *Maxwell*, 2 *N. Y. Rep.* 408, 415. *Burd* v. *Tilson*, 25 *id.* 195. *Park* v. *Johnson*, 4 *Allen's* [*Mass.*] *Rep.* 295.)

John E. Burrill, for the respondent. I. An action for specific performance is addressed to the sound discretion of the court, and the court will not grant a decree in such action unless the contract be fair, just and reasonable, and free from all fraud or improper conduct. (*Gale* v. *Archer*, 42 *Barb.* 320. *Lynch* v. *Bischoff*, 15 *Abb. Pr.* 357. *Slocum* v. *Closson*, 1 *How. App. Cases*, 705, 751.)

II. It is not necessary for the defendant to show that she has been defrauded or intentionally imposed upon; but it is sufficient if she misunderstood the contract, misapprehended its provisions, and did not correctly understand its force or effect at the time of the execution. If the court, from all the circumstances, came to the conclu-

sion that, if she had correctly understood its provisions, she would not have executed the contract, or that she signed it under a misapprehension of its contents, force or effect, and that she was influenced to sign it by the protestations of friendship made by Cuff, or that for any reason she ought not to be compelled to execute it, the court will not decree a specific performance.

III. The circumstances in which this lady was placed—her protracted illness, which produced great physical debility, her solitary condition, without friends to aid or advise her in the management of her affairs, her pecuniary embarrassments, arising from her inability to pay the interest upon her mortgages, and her anxiety in regard to herself and her sister, were entitled to great consideration in disposing of these questions. Whether any advantage was taken of her condition or not, it is evident that in her then physical condition, produced by long illness, and her mental condition disturbed by her pecuniary embarrassments and great anxiety, she was not in a condition to take care of her own interests, or deal with a designing or plausible man.

IV. The circumstances immediately connected with the execution of the paper show the dishonesty of the plaintiff. 1. The contract was drawn by the plaintiff, and if it was read over to her by the plaintiff, it was read, as we allege, incorrectly. 2. The defendant had no legal adviser, and there was a design on the part of the plaintiff that she should not consult with any one. 3. No effort was made to secure the presence of counsel for her. On the contrary, the plaintiff objected to the calling of Mr. Prudens, who lived in the same house. 4. It was known that Marshman was in the next room, and he was not called in. 5. The plaintiff desired that there should be secrecy, and instructed the defendant, if asked who bought it, to say Peter Cummings—a fictitious name. 6. When the defendant was negotiating with Pulvermacher to sell the lots

at $16,000, the plaintiff shook his head at the defendant, to indicate to her that she was not to negotiate with him. 7. The contract was signed by the defendant when she was alone with Cuff; and her daughter, who was in the next room, was not called in until after the paper had been signed by her mother; and it was Cuff, and not the defendant, who then asked her to sign it. 8. After the contract was executed, no copy was furnished to her or to her counsel, and Mr. Vernon was not able to get an inspection of it until the 13th April, when it was recorded, nearly two months after it was executed.

V. The peculiarities in regard to the contract are important to be considered. 1. The contract, as drawn, contains no obligation on the part of the plaintiff to perform, is without mutuality, and could not be enforced against him. 2. It is not executed by the plaintiff, nor was any counterpart of it given to her. 3. No time is provided for the delivery of the deed, although it is apparent from the evidence that the defendant's interest required that the sale should be consummated at once. 4. The character of the deed is not mentioned, and no provision made in regard to incumbrances, and no provision made to secure interest. 5. No provision in regard to stamps. 6. The provision allowing a payment of the balance in installments is unusual, and advantageous only to the plaintiff. 7. An inspection of the paper shows that it has been altered since it was prepared and signed, or that Cuff's story in regard to it is untrue. (*a.*) In regard to the figures $2500, which, from the difference in the ink, were evidently inserted at a different time. (*b.*) The insertion of the words at the commencement of the contract.

VI. In regard to the price agreed to be paid for the property. 1. Aside from the question whether the consideration was or not adequate, it is evident that the defendant did not understand that any part of the price was

to be left on mortgage, but she understood that it was to be paid in cash. (*a.*) Mrs. Dorland testifies to this positively. (*b.*) Miss Dorland says that from the way in which Cuff read the contract, she understood that the whole purchase was to be paid in cash. (*c.*) Vernon says that he understood from Mrs. Dorland that it was all to be paid in cash, and that he never heard anything about a mortgage from Mrs. Dorland, nor until he had read the contract at the register's office. (*d.*) Other witnesses say that Mrs. Dorland represented it to them as a cash transaction. (*e.*) In addition, it is also proved that in all previous negotiations the defendant had always insisted on the purchase money being paid in cash. (*f.*) Again, the pecuniary embarrassments of the defendant, and her necessities, required that the purchase money should be paid in cash, and the probabilities are greatly in favor of the truth of her assertion that she understood this offer to be a cash offer. 2. The evidence shows that the lots were worth more than the price in the contract. (*a.*) This is virtually conceded by the plaintiff. (*b.*) It is proved by the fact that Marshman had offered $16,000, and was prepared to offer $17,000, and went there for that purpose. (*c.*) It is proved by the fact that Pulvermacher offered $16,000, and that both these parties represented respectable men, who were able and willing to purchase and pay for the property. (*d.*) The fact that the property was actually sold to Fitzpatrick in June, 1866, about three months after the contract, for $18,000. (*e.*) Cuff himself authorized Marshman to sell the property on his account, and the price he asked was $18,000. (*f.*) Mitchell, the owner of the adjacent lots, valued these lots at over $18,000, making allowance for difference in size between these and full lots, and for excavations. (*g.*) The lots at the Hegeman sale (proved by Mr. Robinson, the referee,) situated a short distance above these, produced $26,600, which, making same allowances, would bring these lots to about $20,000.

(*h.*) This evidence of the actual sales of lots is more reliable than the opinions of witnesses in regard to value, which opinions are always widely different. (*i.*) No one pretends, not even Cuff, that the lots were not worth more than the price which he agreed to pay for them, and his efforts to compel the defendant to perform this contract specifically, show that he knows the value of the lots.

VII. Cuff exercised great influence over the defendant, and by his protestations of friendship and promises, which he wholly failed to carry out, succeeded in getting her to sell him this property at a price less than its worth, and less than she had actually been offered for it. 1. The price he agreed to pay was $15,500, and she had been offered and had refused $16,000, and her asking price when he applied was $18,000. 2. Cuff admits that she told him that she would let him have the property for $500 or $1000 cheaper than any one else. 3. It is not to be supposed that this was done by the defendant as a gratuity, or as an evidence of good feeling towards Cuff. 4. The only inducement was that he professed good friendship for her; undertook to advance money enough immediately to pay off all the unpaid interest, &c., to aid her in the management of her affairs, and agreed to render her in this way services worth $500 to $1000. This is more probable than Cuff's statement, that she gratuitously sold him her lots $1000 less than she had been offered. 5. Cuff gave the defendant to understand, even if he did not expressly promise, that he would render her services to the amount of this difference. 6. The defendant furnished Cuff with a list of the various items of debts for interest, taxes, &c., which it was necessary for her to pay, and which he, Cuff, agreed to pay at once.

VIII. The pretense set up by Cuff, that after the contract in question was made, it was varied by a parol agreement, by which Cuff agreed to pay an additional $3500 in cash, making $8500 in cash—and in consideration of that,

Mrs. Dorland agreed to take a second mortgage—is not sustained by the evidence. 1. As an effort to vary the written contract by a parol contract, this failed. 2. If it was offered as evidence to show a recognition by Mrs. Dorland of the original agreement, it also failed. (*a.*) It was denied absolutely by Mrs. Dorland. (*b.*) Mr. Vernon never heard of any such arrangement, nor did Miss Dorland, nor any one connected with the defendant.

IX. The acknowledgment of the contract, alleged to have been made on the 2d of April, by the defendant before Lang, the notary, was never made by the defendant knowingly, and if Lang ever went there to take it he did not go on the 2d of April, but at a much later period. 1. The acknowledgment was not filled up by Lang but was prepared by Cuff's attorney, leaving a blank for date and for signature. 2. The memorandum in the diary of Lang was made before the 2d of April, as he says, and therefore furnishes no evidence that he went there on that day.

X. The length of time which elapsed between the contract and the alleged tender. The rule of law is laid down in 42 *Barb.* 320, and other cases there referred to. 1. Here the circumstances show that it was the understanding of the defendant that the contract was to be closed as soon as the title could be examined. 2. The title was completed and the papers ready, as testified to by Mr. Banta, about the 1st of April, and the deed was presented to the defendant to execute, and she refused. 3. This refusal was communicated by Mr. Vernon to the plaintiff and his counsel almost immediately thereafter, and certainly on or before the 13th of April. 4. Mr. Vernon states that he declined to negotiate with Cuff, on the basis of this agreement, after the 14th of April, and that whatever took place after that was entirely independent of it. 5. That the subsequent negotiations were outside of the contract, is shown by the fact that Cuff offered $500

more money. 6. It is distinctly proved by Mr. Vernon and Mrs. Place, that the defendant refused to accept a second mortgage on these lots, or any other lots, and that this refusal was communicated on or before the 14th of April. 7. Mr. Vernon, in order to put an end to all claims under the contract, tendered the deed on the 14th day of April, he at the time, however, supposing that the whole was to be paid in cash. 8. The plaintiff certainly knew at that time that the defendant had taken her stand in regard to this matter, and if he intended to perform it, he should then have made a tender and offered to perform; but instead of that, he waited until the 13th of June. 9. The truth is, that after Cuff had made this contract he found himself unable to perform it, and that he then set to work to induce the defendant to make changes and modifications, to which she invariably refused to assent. All these offers were made by Cuff. Vernon says that none originated with Mrs. Dorland, but that Cuff kept making new propositions. It cannot be that a party in default can excuse the default, by making some efforts to induce the opposite party to waive it and grant indulgence. 10. Mr. Vernon states that Cuff told him that he was prevented from carrying out this contract, because he had expended his means in purchasing another piece of property in Thirty-eighth street; and although Cuff denies this, it is remarkable that Cuff is proved to have purchased a property in Thirty-eighth street at this very time; and if Mr. Vernon's statements be not correct, it certainly is a wonderful coincidence.

XI. Cuff, fully aware that he had obtained a great advantage over the defendant, determined to get these lots, and resorted to various plans. 1. He attempted to coax the defendant into giving the deed, by offering to divide with her if he should get $20,000 for the lots. 2. He attempted then to induce her counsel, Mr. Vernon, to betray his trusts, on the promise of Cuff that he would make it

right. 3. He then resorted to threats that he would law it as long as he had a cent, and that he would have these lots even if he could buy all the lots between there and Fourteenth street for half price.

XII. Cuff wholly failed to fulfill his promises to Mrs. Dorland, which were a great inducement to the making of the contract.

XIII. In conclusion we submit—1. That both the circumstances under which the contract was procured, and the nature of the contract, are such as to preclude the plaintiff from a judgment for specific performance. 2. That there has never been any bona fide intention on the part of the plaintiff to carry it out. 3. That he was, in fact, unable to fulfill his promise, and thereupon commenced his attempts to induce the defendant to change the contract to meet his views. 4. That finally finding that the defendant refused to be imposed upon he made a tender, knowing that he had forfeited his rights to a performance of the contract, and without the slightest idea that she would accept it. 5. The whole proceeding is a speculation to make profit out of this lady, who in her enfeebled and dependent condition was unable to protect her interests.

By the Court, INGRAHAM, P. J. The plaintiff asks for a decree for specific performance of an agreement to sell some land on Fifty-fifth street and 8th avenue, in the city of New York. The court gave judgment for the defendant, from which judgment the plaintiff appeals.

The agreement on which this action was founded is very imperfect in its character. It binds the defendant to sell the property at a fixed price, to be paid in installments to suit the purchaser; $5000 on delivery of the deed, and the balance in installments, without providing for any mortgage or security for the purchase money, and

without any time being fixed for the completion of the contract.

The circumstances under which the contract was executed were not of a character to call for its enforcement by the court. It was drawn by the plaintiff, to be signed by the defendant, a female not versed in such matters, in the absence of any legal adviser, when she had been for a long while an invalid, confined to the house by sickness, in embarrassed circumstances, and urged to execute it by the plaintiff. The defendant also signed the contract under a misapprehension of its contents, as to the terms of payment, as she understood that the whole purchase money was to be paid in cash. These are the findings of the court, upon the evidence.

It also is in proof that the plaintiff had applied to the savings bank to obtain a loan on the property for less than the amount to be paid, and this fact strengthens the supposition naturally drawn from the contract, that he did not contemplate giving any security to the defendant for any installments that would come due after the delivery of the deed.

In addition to these facts, the mode in which the acknowledgment by the defendant was obtained, the unexplained difficulty as to the date, and the strong contradictory evidence as to the fact of any acknowledgment having been made by the defendant, throw great doubt on the *bona fides* of the whole proceeding.

Added to these facts, the delay on the part of the plaintiff between the making of the contract and making the tender, shows that the object of the plaintiff was merely to use the contract for the purpose of a speculation in selling the lots, if an opportunity offered.

The statement of these several matters, connected with this alleged contract, we think fully justifies the decision of the justice before whom the case was tried, in refusing to decree specific performance. The terms were not fair

and just, and the circumstances under which it was executed were such as to render it very doubtful whether it was understood by the defendant in such a way as to make it a valid contract on her part, or at any rate not so clearly, as to call for a decree of specific performance, even though the court do not impute to the purchaser any intended deception or fraud.

But it seems to me that the justice who tried this case, while he refused to decree specific performance, should have retained the case for the purpose of awarding to the plaintiff the damages he was entitled to for the non-performance. The rule is now well settled that in actions brought for equitable relief and tried before a judge, if there appears to be no ground for granting such relief, the court should retain the cause and grant such legal relief as may be just. (*Marquat* v. *Marquat*, 12 *N. Y. Rep.* 336. *Central Ins. Co.* v. *Protection Ins. Co.*, 14 *id.* 85. *Despard* v. *Walbridge*, 15 *id.* 374. *N. Y. Ice Co.* v. *Northwestern Ins. Co.*, 23 *id.* 357. *Phillips* v. *Gorham*, 17 *id.* 270.)

In the *N. Y. Ice Co.* v. *Northwestern Ins. Co.*, (*supra*,) The chief justice says: "It was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough of his case to entitle him to recover," &c.

The plaintiff alleges in his complaint that he paid $50 on signing the contract, and that he has since paid other sums, amounting to $377, making in all $427, which, if the contract is not performed, he is entitled to recover from the defendant, with interest from the dates of payment.

The plaintiff proved that the price he was to pay for the lots was a full price for them, and none of the witnesses state any increase in value; there is no other damage, therefore, proven.

The judgment for the defendant should be reversed, and judgment ordered for the plaintiff for $427 and interest from the dates of payment.

If the parties do not agree on the amount, the judgment is opened and the case referred to Thomas W. Clerke, Esq., to take proof as to the amount the plaintiff is entitled to recover, and report thereon, with his opinion.

[NEW YORK GENERAL TERM, January 3, 1870. *Ingraham, Geo. G. Barnard* and *Brady*, Justices.]

SCHAPPNER *vs.* THE SECOND AVENUE RAILROAD COMPANY.

If a jury take a paper which is given in evidence in the cause, with the concurrence of the judge, it is not error; that proceeding resting entirely in the exercise of a sound discretion by him.

If the jury take a paper with the concurrence of the judge, though without the knowledge of the parties, and although it may not have been put in evidence, it is not error if it appear either that it was not read or used by them; or that, being immaterial in its character, it can be seen from an examination of the whole case, that it could not have had any bearing upon the issues, or the result.

Where the defendants' counsel, before the jury rendered their verdict, objected to its being received, on the ground that the jury had sent, while in their room, for an annuity table, which was sent to them by the court without the consent of either of the parties; which objection was insisted upon on appeal; but no motion was made to set aside the verdict for irregularity; *Held* that the objection was not presented in an available form.

Held, also, that the defendants' counsel might have requested the judge to instruct the jury that the annuity table should be discarded from their consideration; and possibly, if such a course had been pursued, it would have appeared that the table, though in possession of the jury, was not in fact used by them.

THIS was an action to recover damages for a personal injury, alleged to have been sustained by the plaintiff in consequence of the negligence of the defendant or its servants, by which he was seriously injured and permanently disabled.

The action was tried before Justice E. DARWIN SMITH and a jury. When the plaintiff rested, the defendants' counsel moved to dismiss the complaint, on the grounds,

(1.) That no negligence on the part of the defendant was proved; (2.) That according to the plaintiff's own evidence he was guilty of negligence, which contributed to the injury. The motion was denied, and the defendant excepted.

The jury found a verdict in favor of the plaintiff for $5000 damages; and the defendants appealed from the judgment entered thereon.

John H. Platt, for the appellant.

Charles A. Jackson, for the respondent.

By the Court, BRADY, J. The defendants' counsel, before the jury in this case rendered their verdict, objected to its receipt on the ground that they had sent, while in their jury room, for some book, which was sent to them by the court without the consent of either of the parties. The presiding justice said, in answer to this objection, "It is proper that the counsel should understand the precise facts of the case. The jury said they wanted the annuity table, and I directed the officer to take them the Code opened at the annuity table." The objection was then overruled; the defendants' counsel excepted, and the verdict was rendered. On the argument we decided that none of the other objections and exceptions were available to the defendants; that no error had been committed which would warrant us in disturbing the judgment, reserving however for consideration the alleged error in allowing the jury to have the annuity table as already stated. It may be observed here, that there is no evidence of the age of the plaintiff in the case, and that it does not appear for what purpose the jury desired the table, although it may be assumed that it was to assist them in estimating the damages which should be awarded to him. The authorities in this State bearing upon the question

presented by the exception, although to some extent inharmonious, enable us to dispose of it without difficulty.

In *Hackley* v. *Hastie and Patrick*, (3 *John.* 252,) it appeared that the jury took out with them a commission for the examination of certain witnesses, with the interrogatories and depositions annexed, a paper attached to which had been read in evidence on the trial, and that no consent of counsel had been given for the purpose. The defendants moved to set aside the verdict given for the plaintiff, for irregularity. It was shown, in answer to this motion, that the papers were not read by the jury, and the court said "the decisions on this subject, to be found in the books, are contradictory. Some of the ancient cases (*as to these see Graham's Prac.*, 2*d ed.* 313–315; *Buller's Nisi Prius*, 308; *Coke Litt.* 227, *b*) are very strict, but of late years courts have been inclined to be less rigid, and to decide according to the real justice of the case. If the jury have never looked at the papers, nor have been influenced by them, there can be no just cause for setting aside the verdict." The motion was denied. This is the first case in our courts that I have been able to find, and which, as suggested, was a departure from the rule which had prevailed theretofore. The next case is *Thayer* v. *Van Vleet*, (5 *John.* 111.) In that case, which went up on certiorari from a justice's court, it appeared that the jury having retired to deliberate on their verdict, sent for the justice, and asked him if they could add anything to the plaintiff's demand, and he answered, "No." This was held, nothing more having been done, not to be a sufficient irregularity to set aside the verdict. The court said in, substance, that the justice had answered a question of law. That the evidence justified the verdict. That there was no semblance of abuse, and that the consent of parties might be inferred. In *Henlow* v. *Leonard*, (7 *John.* 200,) which also came up on certiorari from a justice's court, the plaintiff in error contended that there was an irregularity

in the justice going with a witness to the jury, at their request, and permitting him to be examined by them, after they had retired to consider their verdict; but it having been done openly, after notice to parties, and as the court said, "we may fairly presume in their presence," and there being no question as to the justice or merits of the verdict, the court held that there was no ground of complaint. The decision rests upon the fairness of the finding by the jury, and the presence of the parties when the objectionable act was committed. In *Smith* v. *Thompson*, (1 *Cowen*, 221,) it appeared that two of the jurors eluded the care of the constable and separated for the night from their associates, returning, however, in the morning and going into court with them. The court held it to be clearly irregular in the two jurors to separate from their fellows, but that it did not affect the merits of the case between the parties. That the ancient strictness in relation to the conduct of jurors was somewhat relaxed, as might be seen in *Hackley* v. *Hastie*, (*supra;*) and that whether the verdict is to be set aside, must depend upon circumstances and the real justice of the case. And further the court said: "If there is a probability of abuse, we then notice it, but here is none." This case is a continuation of the rule that the merits of the controversy, and the probable effect of the irregularity complained of, will be considered in determining whether the verdict should be disturbed.

In *Bunn* v. *Croul*; (10 *John.* 239,) which came up on certiorari from a justice's court, it appeared that after the jury had retired they requested the justice to inform them whether a certain point of evidence had been given, stating it to him, to which he answered that it had been given, and mentioned the witnesses who had testified to the fact. The court held that it could not be fairly inferred from the return, that the explanation given by the justice was by the consent or in the presence of the parties; and that if it was not, the allowance of such a practice would be

dangerous to the rights of parties. The judgment was reversed. It appears, however, from the report of the case, that the evidence was not set forth in the return, and the question passed upon was not considered, therefore, with reference to the merits, but as an abstract proposition. In *Taylor* v. *Betsford*, (13 *John.* 487,) which came up also on certiorari from a justice's court, it appeared that the jury having retired to deliberate upon their verdict, the justice, at their request, went into the room with them, to answer certain questions proposed to him by them. He was not accompanied by the parties, nor had he obtained the consent of the plaintiff in error, who knew, however, that he was going, but did not object. The judgment was reversed. The court held the act of the justice to be erroneous, not having been done by the consent of the parties, and declared that whether the information given by the justice was material, or had any influence upon the verdict of the jury, was a matter which they would not inquire into. In that case, therefore, the merits were not only not considered, but the consideration of them was repudiated, and it may be regarded as an authority expressly to the point, that after the jury have retired they cannot be approached in reference to the subject matter, without the consent of the parties. It is not improbable that the information given by the justice would have been unexceptionable if the jury had been brought into court, or it had been given in the presence of or by the authority of the parties. It may be, too, that the information was in itself unobjectionable or immaterial; but the court refused to consider its effect, and thus restored to some extent the rigid rule which, in *Hackley* v. *Hastie, &c.*, (*supra*,) was said to have been relaxed, and withdrew from the proposition that the consideration of these irregularities was to be determined according to the real justice of the case.

In *Neil* v. *Abel*, (24 *Wend.* 185,) it appeared that the

justice, after the jury had retired to consider their verdict, at their request sent them his minutes of testimony, without consulting the parties. About five minutes afterwards the justice informed both counsel what had been done, and they advised him that it was improper to give the minutes to the jury without the consent of the parties. He thereupon went to the door of the jury room and demanded his minutes, which were immediately handed to him. He neither went into the room nor spoke to the jury. The common pleas reversed the judgment on the sole ground that the justice improperly permitted the jury to have the use of his minutes. The judgment was affirmed. Bronson, J., in delivering the opinion of the court, said it had always been the policy of the law to watch over the deliberations of the jury with great care, and scrupulously to guard them against any extraneous influences. He seems to have been influenced much, however, by the opinion which he expressed, that the minutes of testimony kept by the justice were usually very imperfect. No consideration was given to the merits, and none to the effect of the act complained of, but the case of *Hackley* v. *Hastie* was referred to and not disapproved. In the *Farmers and Manuf. Bank* v. *Whinfield*, (24 *Wend.* 419,) the jury were allowed by the judge to take with them, when they retired to deliberate on their verdict, a paper which was regarded by the court in banc as irrelevant. It was held to be error. The question was presented, however, on a bill of exceptions, and Cowen, J., said, in reference to allowing jurors to take papers with them: "The effect upon the verdict is another matter. Even if improperly allowed to go to the jury, where it appears affirmatively and clearly that they have worked no prejudice, the verdict perhaps would not be set aside on a case;" thus reasserting, in 1840, a doctrine pronounced in *Hackley* v. *Hastie* (*supra*) in 1803, and which had been recognized, as we have seen, in cases intermediate those

dates. In a more recent case, (*Howland* v. *Willetts*, 9 *N. Y. Rep.* 170,) it was held not to have been error in the judge to allow the jury to take with them a deposition read on the trial; and the opinion of Mr. Graham, in his treatise on New Trials, (vol. 1, page 80,) that such a proceeding should be left to the sound discretion of the judge, seems to have been approved.

These cases establish the rules prevailing in this State with sufficient precision to render it unnecessary to seek elsewhere for illustration; and the following are fairly deducible from them.

1. That if the jury take a paper which was given in evidence in the cause, with the concurrence of the judge, it is not error—that proceeding resting entirely in the exercise of a sound discretion by him. 2. That if the jury take a paper with the concurrence of the judge, though without the knowledge of the parties, and although it may not have been put in evidence, it is not error if it appear either that it was not read or used by them; or that, being immaterial in its character, it can be seen from an examination of the whole case that it could not have had any bearing upon the issues or the result. (*See Graham on New Trials, vol.* 1, 76; *Lonsdale* v. *Brown*, 4 *Wash. C. C. Rep.* 148.) This is the more equitable rule, and is more in consonance with the familiar principle established by a series of cases, to the effect that if from the whole case the court can perceive that the admission of irrelevant or immaterial evidence could not have prejudiced the party complaining, the objection to it is valueless.

The annuity table I regard as a paper only given to the jury at their request; and as there was no evidence of the plaintiff's age, it would seem to be impossible, considering the amount of the verdict given in this case, that it could have been employed to the disadvantage of the defendants. The plaintiff was seriously injured and permanently disabled. He had been three months in hospital, and

more than a year under treatment, still using crutches. The bill of one of the doctors who attended him was $500, and his earnings were from $12 to $14 per week. As a compensation for these injuries—for his suffering, his expenses, his loss of time and permanent disability, involving the loss of the use of one of his legs—the jury gave $5000. The annuity table did not contribute to make the damages excessive, inasmuch as they are not so; and it cannot therefore be said that their use was to the prejudice of the defendants. If we do not arrive at the conclusion that the jury gave the plaintiff too large a compensation, we should not disturb the verdict, the table having no possible bearing on any other subject before the jury.

There is, however, another difficulty which encounters the defendants, and that is that they have not presented the objection, which has been considered, in an available form. The objection was to receiving the verdict, but no motion was made to set it aside for irregularity, in which form the verdict has generally been assailed. (*Howland* v. *Willetts*, *supra*.) They might have requested the judge to instruct the jury that the table should be discarded from their consideration; and it may be that if such a course had been pursued it would have appeared that the table, though in possession of the jury, was not in fact used by them. I think, upon these grounds, the judgment should be affirmed.

[New York General Term, January 8, 1870. *Ingraham*, *Geo. G. Barnard* and *Brady*, Justices.]

55b 505
19ap436
55b 505
172 NY 502
172 NY 503

HORATIO BASSETT *vs.* ISAAC H. BASSETT and ROBERT W. ABORN.

The defendants and P. & Co. were in the habit of exchanging blank notes, which were filled up by the holders as they were used. Certain notes, in suit, were made and indorsed by the defendants' firm, and delivered to P. & Co. for their use, and were indorsed by the plaintiff for the accommodation of P. & Co. to facilitate the discount of them for that firm; and on the delivery of such notes to P. & Co. the latter gave in exchange, in part, trade paper, and in part blank notes to be filled up by the defendants for their use. *Held* that the notes in suit were not to be deemed merely accommodation paper, but were business paper, negotiated for value; and that the plaintiff, as indorser, having paid and taken them up, could recover the amount of the defendants.

Certain jewelry was pledged to the plaintiff, by the defendants, to secure the payment of notes given by the latter and indorsed by the former for the benefit of P. & Co., including the notes in suit. Such jewelry was not to be used if the notes could be collected of the makers. No demand was ever made, nor any consent given that it should be disposed of for that purpose, prior to the bringing of a suit by the defendants' assignees against the plaintiff, in which an order was made, directing the sale of the jewelry. *Held* that there was no obligation on the plaintiff to sell, prior to that time, nor any duty owing by him to the defendants, by which he could be held responsible for an omission to sell previous to such order of the court.

Notes were made and dated and fell due in 1854, the maker being then a resident of this State. He left this State in 1854 and moved his family to New Jersey, where he resided and kept house, from that time till 1864; during which period his business was in New York, and on week days he was in the city daily, returning to his home at evening. In an action brought upon the notes in 1866, *it was held* that the statute of limitations did not run while the defendant resided in New Jersey; and that the suit was not barred.

The object of the exception in the statute was to give the creditor the whole of six years' residence in the State within which to commence his action. He is not obliged to follow the debtor to another State; nor is he called upon to watch him to ascertain whether he comes into the State for a temporary purpose, so long as his residence is elsewhere. *Per* INGRAHAM, P. J.

APPEAL by the defendant Aborn from a judgment entered on the report of a referee.

The defendants and C. C. Peck & Co. were in the habit of exchanging blank notes, which were filled up by the holders as they were used. The notes in suit were signed and indorsed by Isaac Bassett, one of the defendants'

firm, delivered to C. C. Peck & Co. for their use, and were indorsed by the plaintiff for the accommodation of C. C. Peck & Co., at the request of Charles H. Bassett, to facilitate the discount of them for that firm. On the delivery of the notes to Peck & Co., they gave, in part, trade paper, and in part blank notes to be filled up by Bassett & Aborn for their use. There is evidence to show that these notes were filled to a large amount and used for the benefit of Bassett & Aborn. It is also in proof that Peck & Co.'s notes to Bassett & Aborn would have amounted to much more than the notes of the latter firm given to Peck & Co. Before these notes became due both firms failed, and Bassett & Aborn made an assignment, in which these notes are stated to be indorsements of the plaintiff for the accommodation of the firm. After the notes were indorsed, certain jewelry was delivered to the plaintiff as security, and upon the condition that if the notes could not be collected, the proceeds of the jewelry were to be applied to the payment of the notes. This was in August, 1854. A suit was brought by the assignee of Bassett & Aborn, against the plaintiff, to determine whether these notes were a valid claim against the assignee, and a decision was rendered in favor of Horatio Bassett, but the assignment was set aside. In the progress of that action an order was made directing the jewelry to be sold, and the proceeds applied to the payment of the notes; and such jewelry was sold for about one-third of the value at which it was appraised when delivered to the plaintiff.

When the notes fell due, they were not paid by the makers, and the plaintiff, as indorser, took them up and brings this action for the amount. A question also is made as to the effect of the statute of limitations, on the following facts. The notes were dated and fell due in 1854. The action was commenced in 1866. Aborn left the State of New York and moved his family to New Jersey, where he kept house from September or October, 1854, until De-

cember, 1864. During all his residence in New Jersey his business was in New York, and during week days he was daily in the city, returning to his home at evening. In December, 1864, they came to the city and stayed during the winter, returning to New Jersey in the spring of 1865. He spent the winter of 1865 in New York, and in November, 1866, removed from New Jersey to the city. The referee reported in favor of the plaintiff, and the defendant Aborn appealed.

Wm. H. Leonard, for the appellant. I. The referee errs in his fifth finding of fact, that the eight notes in suit were delivered to C. C. Peck & Co. for their blank notes and trade paper, and in his second conclusion of law, that they thereby became business paper negotiated for value. The weight of evidence is the other way. Isaac Bassett contradicts it. So does Mr. Aborn. He testifies that no business paper was received from Peck & Co. in exchange for the notes in suit. Had it been so, he must have known it. The finding is supported only by the testimony of Charles H. Bassett. Peck & Co. furnished the jewelry as security for the notes. They would not do so, had they paid a consideration to Bassett & Aborn. Charles says there was no agreement on the subject. He may have left his blank notes with the defendants, but if he received the defendants' notes, it was not in exchange or with the knowledge of Aborn. Charles also admits that there was an indebtedness of Peck & Co. on the books, to Bassett & Aborn.

II. The plaintiff stands in no better situation by reason of having paid the money for the notes on his indorsement after their discount at bank, than he would if he had paid the money at the time he indorsed them. Charles Bassett swears that he procured the indorsement of the notes by Horatio, and that he received the proceeds on their being discounted. Horatio told Aborn that he knew from the

large, bold writing, that his brother Isaac signed them. Charles also stated to Horatio the purpose for which he desired the indorsement. It is clear that Horatio knew the notes were given for the accommodation of Peck & Co., and that he had sufficient reason to suspect that they were made by his brother Isaac only. The preference of the notes in the assignment of Bassett & Aborn is sufficiently explained in the testimony of Aborn.

III. The referee erred in his sixteenth finding, that when the plaintiff indorsed the notes he had no knowledge or notice that the same were not business paper.

IV. The referee erred in concluding as a matter of law, that the plaintiff owed no duty to the defendants, in regard to the jewelry, which he has not discharged. The plaintiff should have sold before the value had so far declined by age—about seven years—after it was pledged. The orders of the court afford no justification or answer for the injury occasioned by the delay. Mr. Aborn was ignorant of the existence of the security, and had no notice of the sale. The orders were not evidence as against Mr. Aborn, as it does not appear that he was a party to those actions. The referee ought not to have considered them in his findings of fact.

V. The demands were barred by the statute of limitations at the time this action was commenced. Twelve years had elapsed since these causes of action accrued; during all that time the defendant was daily amenable to the service of process in the city of New York. He is not, within the meaning or intent of section 100 of the Code of Procedure. (*Power* v. *Hathaway*, 43 *Barb.* 214. *Ford* v. *Babcock*, 2 *Sandf.* 522. *Cole* v. *Jessup*, 6 *Seld.* 96.) These cases hold that the object of the statute is to afford the creditor an opportunity to serve process. A fair and liberal construction of section 100 does not include the defendant. He did not "*depart from* and reside out of the State;" nor was he continuously absent at any time.

The only case holding an opposite doctrine is that of *McCord* v. *Woodhull*, (27 *How. Pr. Rep.* 54,) which is a special term decision in this district by Judge Balcom.

Brown & Estes, for the respondent. I. This action was brought by the plaintiff to recover the amount of eight promissory notes, made by the late firm of Bassett & Aborn, composed of the defendants in the suit, Robert W. Aborn and Isaac H. Bassett, and delivered by the defendants to the firm of C. C. Peck & Co., in exchange for the notes and trade paper of the last named firm. The plaintiff indorsed these notes as an accommodation indorser, and they were then discounted in the Arcade Bank of Providence. These exchanges were for mutual accommodation, and the notes and paper received by the defendants of C. C. Peck & Co., unpaid at and after the time of maturity of the notes in suit, amounted to $16,000 and upwards, discounted in several banks, or pledged therein as collateral security by the defendants. There can be no question as to the valuable consideration of the notes in suit, especially as against the plaintiff, an accommodation indorser thereof, without notice of any of the alleged defenses of the defendant Aborn. He indorsed the notes at the request of C. C. Peck & Co., and that firm procured their discount in the Arcade Bank of Providence upon the strength of the plaintiff's indorsement. Before these notes fell due, Bassett & Aborn and C. C. Peck & Co. failed and became insolvent, and Bassett & Aborn made a general assignment to one George F. Thomae for the benefit of their creditors, preferring therein the indorsements of the plaintiff of the notes in question. The notes were not paid, and being protested for non-payment, the plaintiff paid them to the Arcade Bank, and received the notes from the bank. He thus became subrogated to all the rights of the bank, and can recover in this action if the bank could do so. (*See Flint* v. *Schomberg*, 1 *Hilt.* 532. 1 *Abb. Dig.*

472 *n.*, 509. *Smith* v. *Gardner*, 4 *Bosw.* 54.) The defendant Aborn claims that the notes were signed by his partner, Isaac H. Bassett, to accommodate C. C. Peck & Co., without any consideration, and without authority from the firm; but it clearly appears from the evidence that his partner, Bassett, made the firm notes, and attended to that branch of the business. That large exchanges of the defendants' firm notes were made with C. C. Peck & Co., for their notes and trade paper; more than $20,000 of which had been pledged or discounted in banks when the defendants failed, and was unpaid. Aborn also says he did not intend to recognize these notes when he executed the assignment, yet he executed it in fraud of creditors if they were not a legal obligation of his firm. He says, in a conversation with the plaintiff, after the commencement of this suit, in which he sought a compromise, that the plaintiff told him he knew Isaac H. Bassett made the notes, from his large handwriting; but there is no reason why he should not have made them; either partner could do so, and Bassett was the partner who attended to this business, and the plaintiff had indorsed other like notes of the defendants, which were paid. But conceding that the notes were given to accommodate C. C. Peck & Co., without consideration and without Aborn's consent, there is no evidence in the case showing that the plaintiff, or the bank, knew any of these alleged facts, and they constitute no defense as against either the bank or the plaintiff; they both stand in the relation of *bona fide* holders for value; and as it was within the scope of the partnership for Bassett, a partner, to make the notes, his partner Aborn cannot interpose his defense successfully, as against an innocent holder for value.

II. A second defense is, that the defendants were the owners of some jewelry which, as alleged, was improperly put into the plaintiff's hands, and which he is alleged to

have converted, and the value of it is sought to be set off against the notes.

The absurdity of this defense will appear in the defendants' own evidence, by the witnesses Isaac H. Bassett and Charles H. Bassett. They say that the jewelry was manufactured by C. C. Peck & Co., and by them placed in the plaintiff's hands as collateral security for the payment of these notes. Both say that they consented to the pledge. Charles says, that although it was formally billed to the defendants, they had never received it or paid for it; that it was invoiced to be used in the plaintiff's hands as collateral to the defendants' notes. But in the event, it was the defendants' property. They assented to the pledge to secure the plaintiff for indorsing their notes, and in either event of ownership, the goods were legally pledged. Aborn's partner, if they owned the jewelry, had the same right to pledge it as security for the payment of the notes as he had to make the notes, and especially as the firm received a consideration for the notes.

If I. H. Bassett had improperly given the notes to C. C. Peck & Co., and improperly pledged the goods to secure the plaintiff's indorsement, it was a matter purely between himself and partner, and not affecting the rights of innocent holders; and if the defendant Aborn had any right to the goods, he lost it by his assignment to Thomae, the general assignee, who holds his interest. These goods were held by the plaintiff a long period before he sold them; they had depreciated in value, in the meantime, by change of styles, being cheap goods, and depending almost entirely upon style for their value. The nature of the pledge was, that the plaintiff might resort to the jewelry if he could not collect the notes. The plaintiff endeavored to collect the notes from the assignee, he being a preferred creditor, but the assignee refused payment, upon the ground that the notes were not distinctly described in the assignment, and a bill was filed to get a construction, and

it was adjudged that the notes were preferred. The plaintiff then applied for an order to sell the goods, which was granted. He proceeded to sell as soon as the order was obtained. He obtained nothing from the assignee, because the assignment was set aside as to a judgment creditor's claim, and the balance in the assignee's hands was absorbed by that claim. The plaintiff was guilty of no negligence in selling. But independent of the nature of the pledge, and the necessary delay in attempting to collect from the assignee, the plaintiff was not bound to sell the goods. It was the duty of the pledgors to pay the debt and redeem the goods. (*See Story on Bailment*, §§ 316–320, *inclusive.*) The plaintiff sold the goods for all they were worth. The order of the court in the suit, authorizing the plaintiff to sell the goods, was good authority, and no notice to the defendant was necessary, other than the order. The assignee only was entitled to notice of sale, and he was a party to the suit. If, however, a notice to the defendants was requisite, and the sale was a conversion, the amount realized from the sale, less the expenses, was all they were worth. Woodbury so testifies, as well as the other witnesses, as to value. All concur in the fact that the goods were never worth half the invoice price, and they were sold for all they were worth at the time of sale, when it is claimed they were converted. No demand was made of the goods. If the jewelry belonged to Bassett & Aborn, they passed to Thomae by the general assignment, and Aborn had no interest in them after that. The plaintiff speaks of the assignment being set aside, but this was by a creditor, and could only be so far set aside as to satisfy the debt; the effect would not be to pass title back to the assignors, at any rate.

III. The causes of action were not barred by the statute of limitations. It is undisputed that the defendant departed from this State, where he resided, and obtained a residence in Orange, New Jersey, in the fall of 1854, about the time

the notes were maturing, and continued to reside there until December, 1866. That during this period he had a place of business in New York city, part of the time as a clerk, and more recently as a merchant. That he came from his residence into the city of New York nearly every business day, except certain vacations, during this period of non-residence. That this action was commenced in May, 1866. The action, being on contract, would have been barred by the statute in six years from the time the causes of action accrued, except for the provision of the Revised Statutes re-enacted by the Code, (§ 100,) which is as follows, viz: "If when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into the State; and if after the cause of action shall have accrued, such person shall depart from and reside out of the State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." Prior to the amendment of 1830, the Revised Statutes simply provided that if, at the time when any cause of action specified in this article shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State. Under this provision it was held in *Fowler* v. *Hunt*, (10 *John.* 464,) that where a defendant was absent from the State when the cause of action accrued, and he subsequently returned into the State, the statute commenced to run and continued to run, even though he immediately departed again and remained absent. After the amendment of 1830, which made the section in substance as re-enacted by the Code, (§ 100,) the court held in *Randall* v. *Wilkins*, (4 *Denio*, 577,) that where the defendant resided abroad when the cause of action accrued, and he returned into this State for one or two days, and then departed and remained away, such return set the

statute in motion, and the cause of action was barred. The court, at page 580, held that the first clause was not affected by the second clause of the section, and therefore held with *Fowler* v. *Hunt*. But this case was directly reviewed and reversed by the case of *Burroughs* v. *Bloomer*, (5 *Denio*, 532,) which was a case precisely like that now before the court. The defendant resided in New Jersey, and did business in New York city, and he came to New York almost daily to attend to his business. The court held "that the defendant must be within the State six years after the cause of action accrues, so the plaintiff might sue him any time." They went further than is necessary to sustain the decision of the referee in this case, and held also "that the time of the defendant's absence is not to be taken as any part of the six years, and that fractions of days will not be computed." That the expressions "and reside out of the State" and "the time of his absence" have the same meaning—they are correlative expressions; so that while the defendant resided out of, he was absent from the State, and until he became a resident the suspension of the operation of the statute continued. Then came the case of *Didier* v. *Davison*, (2 *Barb. Ch.* 477,) in which the chancellor held that a defendant must be at least six years within the State before the statute could create a bar. In approval of this case is the case of *Ford* v. *Babcock*, (2 *Sandf.* 518.) The question there arose on the pleadings by demurrer. Two questions were raised and passed upon, Justice Duer giving the opinion: 1st. Whether the new exception created, being the second clause, is confined, in its proper application, to persons who were residents in this State when the cause of action accrued. 2d. And whether, in the cases in which this exception applies, it is the first period of absence only, and not successive periods, that must be deducted and allowed. (*Page* 525.) The court hold that residents and non-residents alike are affected by the second clause, and that

aggregate absences may be deducted; that the words "such person," in the second clause, relate to the person described in the first, and residents and non-residents, or persons within and without the State where the cause of action accrued, are plainly included. (*See Id.* 526, 527.) The court further hold that the debtor must prove that in the aggregate, deducting the period of each absence, he was six years within the State. (*See pages* 527, 529.) Justice Duer reviews all the cases above cited, dissenting entirely with *Randall* v. *Wilkins*, and does not approve of the obiter opinion of the court in *Burroughs* v. *Bloomer*, that non-residence is constructive absence in all cases, (*see page* 531,) but would seem to approve of the rejection of evidence of short fractional periods of the presence of the debtor within the State, as in this case, because Justice Duer says, (at page 529,) in laying down the rule, "that aggregate absences may be deducted; that it is subject to the modification that where a defendant against whom the statute has begun to run, is a resident of the State, and continues to reside therein, his occasional absences are not to be deducted in computing the statutory term." This rule has been adopted in many cases because of the difficulty in making such proof; and the rule applies with all its force to this case, in proving the temporary visits to New York, as well stated by Justice Balcom, in the case of *McCord* v. *Woodhull*, (27 *How.* 54.) This case was precisely like the case at bar; and Justice Balcom carefully reviews all the cases, and holds that the defendant, in a case like this, must be six full years within the State to bar the action, and that frequent returns, only for fractions of a day, cannot be taken into account in determining whether the action is barred. In this he claims to be sustained by *Cole* v. *Jessup*, as well as *Ford* v. *Babcock*. (*See Cole* v. *Jessup*, 10 *N. Y. Rep.* 96.) These cases (except the earlier one of *Randall* v. *Wilkins*) uniformly hold that the defendant must be six full years within the State, so as to

be at all times amenable to the service of process, and as the referee has found the fact to be otherwise in this case, the judgment should be affirmed. The case is unincumbered by any other question under the statute, for if he had computed fractions of days to ascertain whether the defendant had been six full years within the State, it will be seen that such was not the case. And it is absurd to contend, as against the settled authorities cited, that a return into the State by a non-resident, however open, can benefit the defendant for a longer period than he remains. The only question that can be considered unsettled by the Court of Appeals, is how far the courts may compute brief periods of absence or returns of debtors seeking to avail themselves of the statute of limitations; and this question is settled by the cases of *Burroughs* v. *Bloomer*, *McCord* v. *Woodhull*, and *Ford* v. *Babcock*, in the Supreme and Superior courts, that neither plaintiff or defendant can avail himself, in a case like this, of short absences from or returns into the State. Since this cause was tried, the case of *Bennett* v. *Cook et al.*, involving the same facts of this case in reference to the statute of limitations, has been decided by the general term of the Superior Court, in which they hold the statute was not a bar. Chief Justice Robertson decided the case, but died before his decision was announced, as we are informed by Judge Monell, who announced the decision, all the justices concurring. In the case of *Cowart* v. *Cook*, involving the same question, the plaintiff obtained a verdict, and the defendant has appealed. The case is in the New York common pleas. The cases cited gives a reasonable and fair construction of the statute. The defendant departed from and resided out of the State until the commencement of the action, and the time of his absence cannot be deemed or taken as any part of the time limited. Deducting his actual absence, the literal construction of the statute, and the defendant was not within the State six years, as found by the referee.

If his temporary visits cannot be accumulated, he was not within the State at all, within the meaning of the statute, which seems to be the settled doctrine, because, as the courts say, mere temporary absences and returns cannot be taken into account, although more extended ones may be. The effect of a successful defense upon a plea of the statute of limitations being to deprive a forbearing creditor of an honest claim, as it in effect admits that there is no other defense, will not receive the favor of the court.

By the Court, INGRAHAM, P. J. There can be no doubt as to the sufficiency of the evidence to sustain the finding that the notes in suit were exchanged for notes received in trade, and for blank notes of Peck & Co., signed by them and delivered, with authority to the defendants to fill up as they pleased. Charles Bassett testifies that the notes were given in exchange for trade notes and the notes of C. C. Peck & Co. signed in blank; and that the consideration of the notes in suit was the trade paper and the notes signed in blank. Isaac Bassett, while he says he don't know that the defendants received anything on account of these notes, on cross-examination, says that "the defendants received notes of Peck & Co. in blank, and that they were used by the firm to a considerable amount, and that the proceeds were used for their benefit." Charles Bassett also states that Peck & Co.'s indebtedness to the defendants amounted to some $16,000, while their indebtedness would have amounted to $7000. Without further evidence, it would have been difficult to sustain a finding that the notes in suit were merely accommodation paper. Aborn's testimony to the contrary, is only a want of knowledge on the subject; while the testimony of the other witnesses is positive. The case in 3 *Denio*, 187, is not in conflict with these views, but holds that the notes are exchanged notes, if made to be negotiated and used.

The jewelry pledged as security for the notes was delivered by Charles to the plaintiff to secure the payment of notes given for the benefit of Peck & Co., including the notes in suit. It was not to be used if the notes could be collected of the makers. No demand was ever made, nor any consent given, at any time, that it should be disposed of for that purpose, prior to the bringing of the suit in which the order was made directing the sale of the jewelry and the appropriation of the proceeds. There was no obligation on the plaintiff to sell prior to that time, nor any duty owing by him to the defendants by which he could be held responsible for an omission to sell previous to such order of the court. If there was any responsibility, it was to Charles, and I think none to him, until he requested the sale to be made.

The remaining question is as to the statute of limitations. The evidence shows that the defendant Aborn left this State in 1854, and resided in New Jersey until 1864; but during that period was in New York daily attending to his business. The defendant claims that his daily coming to New York on business prevented the allowance of the time he resided in New Jersey from being considered a suspension of the running of the statute. The words of the statute are, "if after the cause of action shall have accrued, [the debtor] shall depart from and reside out of the State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." In *Burroughs* v. *Bloomer*, (5 *Denio*, 532,) which was a case similar to the present, the debtor removed to New Jersey and resided there, but had a place of business in New York, which he was in the habit of frequenting, sometimes monthly and sometimes daily. The judge charged that the jury were to find whether the time the debtor had spent in the State amounted in the aggregate to more than six years, and if so, to find for the defendants. The Supreme Court held

the charge to be too favorable to the defendant, and that the statute ceased to operate as long as the defendant continued to reside abroad, notwithstanding his return to the State on business. In *McCord* v. *Woodhull*, (27 *How. Pr. Rep.* 54,) it was held that a resident of New Jersey, who spent business hours daily in New York, could not claim the limitation during such residence. The case of *Cole* v. *Jessup* (10 *N. Y. Rep.* 96) arose upon demurrer, and is authority for the doctrine, that in a pleading it is enough to aver that the debtor left the State and resided out of it for a definite time, and that the action was commenced within six years after such return; and that successive absences may be accumulated and deducted.

The construction asked for by the defendant is not consistent with the words of the statute, nor with the intent. The object of the exception is to give the plaintiff the whole of six years' residence within the State within which to commence his action. He is not obliged to follow the debtor to another State; nor is he called upon to watch him to ascertain whether he comes into the State for a temporary purpose, so long as his residence is elsewhere. It may also be said that it was intended to give the creditor control, as well over the person as the property of the debtor, by requiring a residence in the State to give effect to the limitation. This would not be the case if temporary return from time to time could overcome the residence abroad.

The judgment should be affirmed.

[New York General Term, January 8, 1870. *Ingraham*, *Geo. G. Barnard* and *Brady*, Justices.]

PETER MASTERSON and W. H. MASTERSON *vs.* GEORGE A. HOYT and THE MAYOR &c. of the City of New York.

A lease executed by the corporation of New York, to the purchaser, upon a sale of lands for assessments, is conclusive evidence that the sale was regularly made according to the provisions of the statute. This includes the *demand*, of the owner, or upon the premises, and other matters to be done to authorize the sale.

And this being so, a court of equity has jurisdiction to relieve the owner, whenever defects exist rendering the assessment illegal.

The owner cannot rely upon anything on the face of the lease to show its invalidity; but that must depend on oral testimony. He may therefore maintain an action to set aside the assessment, to cancel the lease, and for an injunction, on the ground that the assessment was illegal; that no demand was made of him, or upon the premises; that no warrant was issued for the collection of the assessment; and that the recitals in the lease are untrue.

No man should be required to have such a conveyance of his land put on record, and left there, to be *prima facie* evidence of the facts stated in it, and then to wait for the lessee to take measures to obtain possession under it, before he can be relieved from the injury he sustains by having it on the record. *Per* INGRAHAM, P. J.

APPEAL by the defendant Hoyt from an order made at a special term, overruling his demurrer to the complaint.

The complaint alleged that for many years prior to, and at the time of, his death, Peter Masterson, the father of the plaintiffs, was the owner in fee of the lot situated at the southwest corner of Seventh avenue and Fifty-fourth street, in the city of New York, with the building thereon erected and being. That shortly prior to the 16th day of September, 1853, the said Peter Masterson departed this life, in the city of New York, leaving him surviving the plaintiffs, his sons, with others. That said deceased left his certain last will and testament, which was duly and properly made and executed, and which was duly and properly proved on the 23d day of August, 1853, before Alexander W. Bradford, Esq., the surrogate of the city and county of New York. That the premises aforesaid became the joint property of the plaintiffs, under said last

will and testament, upon the death of their father aforesaid, and since that time they have continued to be, and still are, the absolute joint owners in fee of said premises. That the name of said deceased appeared upon the tax and assessment lists of property in the city of New York as the owner of the premises aforesaid, and the same was never changed since his death, and neither of the plaintiffs have ever appeared on either of said lists as the owner or owners thereof. The plaintiffs further showed that neither of them ever resided upon, or occupied, nor did any member of either of their families ever reside upon, or occupy, any part of said premises, nor did said plaintiff Peter Masterson reside in Fifty-fourth street in said city since long before the year 1853. That no printed, written or other notice was ever served in any manner upon either of them, or upon any member of either of their families, or upon any occupant of said premises, affecting the premises aforesaid, either that there remained any unpaid tax or assessment thereof, or requiring payment of any such, or that said premises had been sold, or would be sold. That said premises were sold on the 24th day of October, 1862, by the mayor, aldermen and commonalty of the city of New York, to satisfy an alleged assessment for local improvements, for building a sewer in Fifty-fourth street aforesaid. That in the proceedings relative to the said assessment, and in the proceedings to collect the same, both frauds and legal irregularities have been committed. That the following are among other frauds and legal irregularities committed in respect to the assessment for building said sewer. The premises aforesaid were wrongly stated to be the property of said deceased, whereas it was the property of the plaintiffs; and that no ordinance was legally made authorizing the building of said sewer; and in respect to the assessments therefor, and the proceedings to collect them, many essential forms were omitted; and said assessment was never confirmed, although it is pre-

tended it was. That no warrant, or other writ or precept, was ever issued, or authorized to be issued, to collect such assessment, and no demand for payment of the assessment upon the premises aforesaid, for the purpose aforesaid, was ever made upon the plaintiffs, or either of them, or upon said premises, or in any other legal manner, and the plaintiffs averred that since the year 1857 they have each been possessed of sufficient leviable personal property and effects to have satisfied said assessment, and all costs and disbursements thereon accrued. That upon the said sale the property was bid in by the said mayor, aldermen and commonalty for the term of one thousand years, and a certificate thereof was thereupon made and delivered to them, which certificate recites all the necessary statutory facts as required by law, and they shortly afterwards assigned the certificate and bid to the defendant George A. Hoyt, who caused said certificate to be filed in the office of the comptroller of the city and county of New York, and said Hoyt thereafter, and before the commencement of this action, received a lease therefor pursuant to said bid and certificate, and prior thereto said Hoyt was informed of the aforesaid defects and legal irregularities. And the plaintiffs averred that said certificate and lease recite the necessary legal requisites, but which are in fact untrue, and that said certificate and lease are clouds upon the title of the plaintiffs to said premises. That some months prior to the commencement of this action the plaintiffs tendered to said defendant George A. Hoyt the amount of the assessment upon the premises aforesaid, with all the disbursements, and legal interest thereon, and demanded an assignment of said bid, or an assignment or revocation of said lease, but said Hoyt refused so to do, or receive said sum, unless he received in addition thereto forty-two per cent interest and a bonus. That said bid, certificate, and said lease, are clouds upon, and affect the title of the plaintiffs to said premises, and diminish

the value thereof, and prevent a sale thereof, and said defendant Hoyt, under said bid, certificate and lease, has attempted and threatens to take possession of said premises, and has notified the plaintiffs' tenants therein to pay him the rent due and to grow due, and not pay the plaintiffs, as they had always done before, and such interference is detrimental and damaging to the plaintiffs in their enjoyment of said premises. That said defendant Hoyt threatens to obtain another or new lease upon said premises from the said mayor, aldermen and commonalty upon said bid, to the great injury and irreparable damage of the plaintiffs. That in equity and good conscience such assessment, bid, and lease upon said premises should be annulled, discharged and revoked, and said defendants should be restrained and forbidden, the one from giving and the other from receiving any instrument, or doing any act or thing, which would or might affect the plaintiffs' title to said premises, or interfere with their full and free enjoyment thereof. Wherefore the plaintiffs prayed judgment as follows: 1st. That said defendants, and all others acting in aid or assistance of them, or either of them, be restrained by injunction from any interference with the premises aforesaid, and be restrained from making or causing any instrument to be made, and doing or causing any act to be done which would in any manner affect the title of the plaintiffs in and to said premises. 2d. That the said bid and lease be wholly canceled, revoked, annulled and discharged, and that the said mayor, aldermen and commonalty be restrained from giving any new or other lease or instrument upon said bid, and from selling said premises, or exposing or offering the same for sale to satisfy such alleged assessment, and that said defendant George A. Hoyt be restrained from receiving any lease or other instrument upon said bid, and from bidding or causing any bid to be made at any sale of said premises to satisfy said assessment. 3d. That said assessment, and all

proceedings to collect the same, be declared void and set aside, and that the plaintiffs have such other and further relief as the circumstances of this case might require, and that the defendants pay the costs of this action.

The defendant Hoyt alone appeared, and demurred to the complaint, upon the ground that sufficient facts were not stated to constitute a cause of action. Also because several causes of action were improperly united, viz., that a cause of action to remove a cloud upon the plaintiff's title was united with a cause of action for an adverse claim. The latter ground was waived, and not insisted upon, on the argument.

Judgment was given for the plaintiffs, with costs.

John Townshend, for the appellant. I. To maintain a title under a sale for taxes or assessments, the lessee must prove a due compliance with every requisite of the statute; amongst other things, a legal assessment, due confirmation of it, a warrant to collect the same, two several demands of the persons liable to pay, notice of sale, notice to redeem, &c. (*Tallman* v. *White*, 2 *Comst.* 70. *Leggett* v. *Rogers*, 9 *Barb.* 411. *Curtiss* v. *Follett*, 15 *id.* 343.)

II. The lease is not evidence of the power to sell; it is evidence only of the regularity of the act of selling. (*Beekman* v. *Bigham*, 1 *Seld.* 366. *Dike* v. *Lewis*, 2 *Barb.* 344. *Doughty* v. *Hope*, 1 *Comst.* 79. *Striker* v. *Kelly*, 2 *Denio*, 323. *Staples* v. *Fairchild*, 3 *Comst.* 41. *Van Alstyne* v. *Erwine*, 1 *Kern.* 331.)

III. The recitals in the lease are not evidence of compliance with the statute. (*Varick* v. *Tallman*, 2 *Barb.* 117. *Beekman* v. *Bigham*, 1 *Seld.* 366.)

IV. In Brooklyn, by special statutory enactment, the recitals in a certificate on a sale for taxes, &c., are evidence of the facts recited. (*Laws of* 1834, *p.* 108, § 45.) The case of *Scott* v. *Onderdonk*, (14 *N. Y. Rep.* 14,) was decided solely

on this statute. But for this statute the decision would have been the reverse of what it was.

V. In an action of ejectment the defendant may set up any and every defense he may have to the plaintiff's recovery. In ejectment by the now defendant Hoyt, it might be shown that his lease was invalid. (*Crary* v. *Goodman*, 2 *Kern.* 266. *Chase* v. *Peck*, 21 *N. Y. Rep.* 581, 586.)

VI. As the now defendant Hoyt could not enforce his lease, unless he shows due compliance with the statutory requirements, and as the plaintiffs allege that those requirements have not been fulfilled, it follows that the lease alleged to be held by the defendant Hoyt is void, and cannot be a cloud on the plaintiff's title of a character entitling him to come into court and ask relief against it. (*Scott* v. *Onderdonk*, 14 *N. Y. Rep.* 14. *Allen* v. *City of Buffalo*, 39 *id.* 386. *Hatch* v. *City of Buffalo*, 7 *Trans. Ap.* 265. *Bouton* v. *City of Brooklyn*, 15 *Barb.* 395. *Crooke* v. *Andrews*, 40 *N. Y. Rep.* 547. *Cox* v. *Clift*, 2 *Comst.* 122.)

VII. The case relied upon by the respondent is that of *Matthews* v. *The Mayor*, (14 *Abb. Pr.* 209,) said to have been affirmed at general term. It is obvious, from the report of the case at special term, that the decision was based on the erroneous supposition that the lease was evidence of the power to sell. It is submitted that this case is distinguishable from *Matthews* v. *The Mayor*, because in this case the lease has been given, and the whole proceeding is complete. The case of *Johnson* v. *Stevens* (13 *How.* 132) was also founded on the Brooklyn statute, and does not apply to this case.

VIII. The action cannot be maintained as one for relief against the assessment. (*Heywood* v. *City of Buffalo*, 14 *N. Y. Rep.* 534.)

A. H. Reavy, for the respondents. I. The plaintiffs' premises were sold by the corporation to satisfy an alleged unpaid assessment thereon; the property was bid in by

the corporation, and the certificate given thereon was assigned to Hoyt, who caused the same to be filed, and thereafter, with knowledge of the frauds and irregularities charged, he received a lease of said premises for the term of 1000 years, and under that lease he has attempted to obtain possession of said premises, and has interfered with the plaintiffs' right thereto. 1st. The corporation had the right to build the sewer for which the assessment accrued. (*Laws Relating to New York city*, 1 *Hoffman*, 595, § 1.) 2d. The corporation is empowered to pay the expense of such work, and the same is then a real incumbrance upon the land, and shall have the same effect as though a mortgage were executed. (*Id. p.* 598, § 7.) 3d. When the assessment is confirmed it is binding and conclusive upon the owners and occupants, and is a lien or charge on the premises. (*Id. p.* 602, § 21.) 4th. The lease given upon a sale for an unpaid assessment shall be absolute; and the occupant and all other persons interested in the land shall be barred of all right and title thereto during the term of years therein mentioned. (*Id. p.* 564, § 184.) 5th. The corporation is authorized to bid in premises sold, and assign the certificate thereof. (*Id. pp.* 564, 565, §§ 187, 188.) 6. There being more than one owner, the assessment should have been apportioned among the plaintiffs. (*Id.* 569, § 206.)

II. If the statements contained in the complaint are commingled together, or the complaint be inartificially drawn, it is not demurrable for such reasons, and if the defendant desires to take advantage thereof, he can only do so by motion. (*Cheney* v. *Fisk*, 22 *How.* 236. *Fickett* v. *Brice*, *Id.* 194. *People* v. *Mayor &c.*, 28 *Barb.* 240. *Buzzard* v. *Knapp*, 12 *How.* 504. *Hillman* v. *Hillman*, 14 *id.* 456.)

III. Equity will interpose if it appear: 1st. That proceedings in a subordinate tribunal will necessarily lead to a multiplicity of suits. 2d. Where they lead, in their

execution, to the commission of irreparable injury to the freehold. 3d. Where the claim of the adverse party is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved in order to establish invalidity or illegality. (*Heywood* v. *City of Buffalo*, 14 *N. Y. Rep.* 534.) 4th. Where the document creates a cloud. (*See Scott* v. *Onderdonk*, *Id.* 16.)

IV. It is averred that notices were not given or served, nor any ordinance made or confirmed, nor was the property assessed to the plaintiffs as owners, nor any warrant &c. issued to collect the assessment; and these facts can only be established by proof *aliunde*, as it appears from the complaint that the ordinance was duly confirmed, and that the sale was legal, and the certificate and lease recite all these facts, as required by law. Therefore the certificate and lease are legally valid upon their face, and are clouds upon the plaintiffs' title to the premises. (*Johnson* v. *Stevens*, 13 *How.* 132. *Matthews* v. *Mayor &c.*, 14 *Abb. Rep.* 211.)

V. It is insisted that the certificate and lease create a cloud, and that equity will not compel the plaintiffs to take the hazard of the loss of their evidence by waiting until Hoyt volunteers to proceed under his lease; but while it is attainable, they have the right to call him into court at once and have the cloud removed. (*Scott* v. *Onderdonk*, 14 *N. Y. Rep.* 16.)

VI. To have sustained the demurrer in this case would in effect tend to deny the plaintiffs the equity they are entitled to, and cause irreparable damage by permitting their title to be clouded without any wrong on their part, and sanction the unfairness of Hoyt, who had knowledge of the irregularities before he received the lease, and who refused to accept the amount of the illegal assessment with interest and disbursements. His conduct is unconscionable, and by the demurrer, he admitting all the statements

contained in the plaintiffs' complaint, it should be liberally construed in the plaintiffs' favor.

VII. The complaint is sufficient, and contains facts establishing an equitable cause of action. (*Matthews* v. *The Mayor*, 14 *Abb.* 209. *Scott* v. *Onderdonk*, 14 *N. Y. Rep.* 9. *Heywood* v. *City of Buffalo*, 14 *id.* 541. *Johnson* v. *Stevens*, 13 *How.* 132.)

VIII. The lease is conclusive evidence of the regularity of the sale. (1 *R. S. p.* 969, § 69, *5th ed.*) And no matter how irregular the proceedings may have been, they could not be assailed by the respondents in an action by Hoyt to recover the possession of the premises. (*Matthews* v. *The Mayor*, 14 *Abb.* 212.) This case was affirmed at the general term.

By the Court, INGRAHAM, P. J. The demurrer admits all that is alleged in the complaint; that the assessment was illegal; that no demand was made of the plaintiffs or upon the premises, and no warrant issued for the collection of the assessment; and that the recitals in the lease are untrue.

The only question is whether these defects can give a court of equity jurisdiction to relieve the plaintiffs; and that depends upon the question whether the lease, when executed, is conclusive evidence that the sale was regular, according to the provisions of the act. If it was, the plaintiffs were entitled to the relief sought. By the statute, (*Davies' Laws*, *p.* 600,) the lease is made conclusive evidence of the regularity of the sale, according to the provisions of the act.

Although there are some things which the lease would not be evidence of, it is evidence that the sale was regularly made. This, of course, includes the demand and other matters necessary to be done to authorize the sale.

The case of *Crooke* v. *Andrews*, (40 *N. Y. Rep.* 547,) although that was under the Brooklyn statute, is an author-

ity to sustain this judgment. The plaintiff could not rely on anything on the face of the lease to show its invalidity, but that must depend on oral testimony. No man should be required to have such a conveyance of his land put on record and left there, to be *prima facie* evidence of the facts stated in it, and then wait for the lessee to take measures to obtain possession under it, before he can be relieved from the injury he sustains by having such a conveyance on the record.

Judgment affirmed.

[New York General Term, January 3, 1870. *Ingraham, Geo. G. Barnard* and *Brady*, Justices.]

Tracy *vs.* The Troy and Boston Railroad Company.

The Troy Union Railroad Company is a corporation of a peculiar character, chartered by a special act of the legislature, and organized solely for the purpose of constructing a railroad through the city of Troy, for the use and benefit of the railroad companies running their trains to and from that city. It neither owns or runs any engines or other rolling stock, nor has the right to operate the road, or use its track for the usual purposes of railroad companies, viz.; the running of engines and cars; and owns no property of any kind, being supported wholly by assessments on the railroad companies for whose benefit the road was constructed; its passenger-house and other property, rights and franchises, belonging to the different railroad companies entitled to use the road.

The defendants are a corporation organized under the general railroad act, running their trains to and from Troy, and entitled by the charter of the Troy Union Railroad Company to use the road, and to exercise, to the exclusion of the Union Company, the right or privilege of running their engines and cars thereon.

The plaintiff's cow, which, in consequence of the defendants' neglect to make or maintain fences, as required by the statute, had strayed from the plaintiff's land on to the track of the Union Company's road, at a place which was in the exclusive occupation of the defendants, and was claimed to be a mere continuation of its line of road, was there killed by the defendants' engine, through negligence. *Held* that the defendants were liable for the value of the cow, the road being substantially their road; and that they

were within the equity and spirit of the section of the general railroad act, making railroad companies liable for all damages done to cattle &c. by their agents or engines, by reason of their neglect to make or maintain fences or cattle-guards; and were subject to its provisions.

THIS action was commenced in a justice's court, and was brought to recover damages for killing a cow, through negligence on the part of the defendants. The plaintiff recovered judgment for the value of the cow, in the justice's court, but on appeal to the Rensselaer county court was nonsuited, on the trial; and from the judgment on such nonsuit, appealed to this court.

Under the general allegation of negligence, the plaintiff claims that the defendants are liable by reason of their neglect to make or maintain fences or cattle-guards at and near the place of collision, as required by the general railroad act, (3 *Statutes at Large*, 635, § 44; *amended*, *Id.* 643, § 8;) in consequence of which negligence the plaintiff's cow strayed from the adjacent lot of the plaintiff on to the track, and was killed by being run against by a locomotive owned and run by the defendants; also that the defendants were liable by reason of negligence, apart from this liability under the statute. But on this latter point no evidence, independent of the act of running over the plaintiff's cow, seems to have been given.

It is conceded that the injuries complained of were caused by an engine owned and run by the defendants. It was not claimed, on the motion for a nonsuit, that the plaintiff was in any degree negligent.

It is in undisputed evidence that the railroad was not fenced, at the point of collision, which adjoins the plaintiff's premises; excepting that one half of the plaintiff's premises was fenced by himself. There are no cattle-guards at that crossing, below the place of collision, and never have been any.

It also appears that some four years before the killing of the cow, the plaintiff called the defendants' attention

to the want of fencing, and requested them to have it constructed; but they omitted to do so. The character of the ground makes it probable that the cow could only have passed on to the track directly from the plaintiff's premises, where she was usually kept, or from the street crossing, some distance below. The railroad, at the place of collision, passes over land exclusively used for the purpose of a track; and the map and explanatory testimony show that neither fences or cattle-guards at or near that place could in any way obstruct any highway, or interfere with public travel or convenience. The place of collision is on the line of what is known as "The Troy Union Railroad," and the defendants therefore claim that they (the defendants) are not liable for injuries caused by their running engines at this point without erecting or maintaining the fences or cattle-guards required by the statute. The defendants also deny negligence generally. The Troy Union Railroad Company is a corporation of an especial nature. It is not a railroad company of the usual character; nor was it organized for the customary purposes of railroad corporations. It is incorporated under a special act. (*Laws of* 1851, *chap.* 255.) And the peculiar and limited nature of its powers are expressed in the act, and are exhibited in the "contract" introduced by the defendants, on the trial. It was organized solely and exclusively for the purpose of constructing a railroad through the city of Troy, for the use and benefit of the railroad companies running their trains to and from said city. This is the extent of its powers. (*Act of* 1851; *Contract*, §§ 7, 9, 14.) It neither owns or runs any engines or other rolling stock, nor ever has owned or run any. It has no right to operate the railroad, or use its track for the usual purpose of railroad companies; i. e., the running of engines and cars. (*Act of* 1851.) It is not organized for profit, and it pays no dividends. It is supported wholly by assessments on the railroad companies for whose benefit the road was

constructed. (*Contract*, §§ 3, 4.) And with the exception of these annual assessments for paying current expenses, it owns no property of any kind or description, whatever. Its "passenger-house, and all other property, rights and franchises," both in possession and reversion, belong to the different railroad companies which are entitled to use the road. Its management consists of a board of directors, chosen exclusively by the different railroad companies, owners, with the mayor of Troy; and the board must always be so constituted. (*Contract*, § 18.) And even in the discharge of its few powers, (such as prescribing necessary police regulations,) it acts merely as the agent of these other companies, for their sole benefit, and by virtue of this "contract."

The defendants, on the other hand, are a corporation duly organized under the general railroad act, running their trains to and from the city of Troy. By the organic act of the union road, the defendants are forever entitled to use the road, and to exercise thereon, to the exclusion of the Union Company, the right or privilege of running their engines and cars. (*Act of* 1851; *Contract*, *passim*.) The union depot, south of the place of collision, is the defendants' terminus of travel. The track at the place of collision is claimed to be a mere continuation of the defendants' line of road, and they alone use the road at that point.

O. P. Buel, for the plaintiff, (appellant.)

Miles Beach, for the defendant, (respondent.)

By the Court, HOGEBOOM, J. The decision of this case, probably, turns upon the true construction to be given to those sections of the act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, (*Laws of* 1850, *chap.* 140, § 44,) and the act to

amend the same, passed April 15, 1854, (*Laws of* 1854, *chap.* 282, § 8,) by which "Every railroad corporation whose line is open for use shall erect and maintain fences and crossings on the sides of their roads, of the height and strength of division fences, and in default thereof shall be liable for damages done by their agents or engines, to any cattle, horses, sheep or hogs thereon." The plaintiff's cow was killed by an engine and train of the defendants, upon the track of the railroad of the Troy Union Railroad Company, which was a railroad in the city of Troy not owning or running any engine or other rolling stock, and in which the defendants, in common with the Rensselaer and Saratoga Railroad Company, the New York Central Railroad Company and the Hudson River Railroad Company, were stockholders, and had a right to use the railroad tracks of the Troy Union Railroad Company, said tracks having been in fact built by and at the mutual expense of said railroad companies.

The action does not appear to have been tried upon the theory of proving *actual* negligence on the part of the defendants in the running of their cars, nor to have been determined in the county court upon the theory of actual negligence on the part of the plaintiff, contributing to the injury; but to have been tried upon the question whether the road in question was, for the purposes of this case, the road of the defendants; the plaintiff maintaining that it was, and the defendants that it was not. If it was, then the defendants were liable without proof of *actual* negligence; inasmuch as no fences or crossings had ever been erected or maintained. (2 *Edm. Stat.* 643, § 8. *Corwin* v. *The New York and Erie Railroad Co.*, 13 *N. Y. Rep.* 42.)

I think the defendants are liable.

1. The road is substantially their road. They contributed to its construction, have a right to use it, and did on this occasion use it, in virtue of the rights conferred by the act organizing the Troy Union Railroad Company,

(*Laws of* 1851, *chap.* 255, *p.* 78, § 79,) were members and stockholders of the latter company, and did the wrongful act complained of.

2. The Troy Union Railroad Company never had any engines or rolling stock, and it is doubtful whether they could be made liable for this injury, on account of never having done the injury; unless it should be construed to be by relation. If they are to be liable, then no other company is liable, except the defendants, because no other participated in the act complained of.

3. The plaintiff is therefore remediless if he cannot have relief in this form, and the obligation to build and maintain fences and crossings, so far as the track of the Troy Union Railroad Company is concerned, can never be practically enforced. The defendants are within the spirit and equity of the act, and, as I think, subject to its provisions.

I am of opinion that the judgment of the county court should be reversed, and a new trial granted therein, with costs to abide the event.(*a*)

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls* and *Hogeboom*, Justices.]

(*a*) Judgment unanimously affirmed by the Court of Appeals.

WEED and COTTON *vs.* CASE.

Where a person asserts a falsehood with a fraudulent design, and damage results therefrom, though he may have no interest even in the deception, it is good ground for a civil action. Intentional and purposed deception is consequently the very gist of an action against a vendor, for deceit in the sale of property; and this must in some way be made to appear, or no legal claim for damages is laid.

If a vendor has knowledge of the character and condition of the property he is selling, and makes a representation respecting it which turns out to be false, the motive with which that representation is made is all important, when he is sought to be made responsible on the ground that he perpetrated a fraud; and the fact whether he really believed, or had any justifiable rea-

son for believing, that what he said was true, is a most legitimate subject of investigation; and in that, as in all those cases of imputed fraud where the motive is the subject of inquiry, the party charged with the fraudulent intent is permitted to be heard.

In order to maintain an action for deceit by means of false representations, it is always necessary to aver and prove an intent to deceive; and whenever a party actually believes what he asserts to be true, he is not liable, although it turns out that what he affirmed was false in fact.

Thus, where, in an action by the purchasers, against the vendor, to recover damages for deceit in the sale of a canal boat, the judge refused to instruct the jury that if they found that the defendant really believed that the representations made by him, in regard to the boat, were true, their verdict should be for the defendant; *it was held* that the judge erred in refusing the instruction asked for.

The case of *Bennett* v. *Judson* (21 *N. Y. Rep.* 238) has always been considered to have carried the doctrine of liability for an alleged fraudulent representation to the extremest verge of the law; and the courts have been very careful to discriminate and apply it only to the state of facts presented by the case itself. *Per* BACON, P. J.

MOTION by the defendant for a new trial on a case and exceptions.

The action was for deceit in the sale of a canal boat. The complaint alleged that on the 16th March, 1867, at Fulton, in the county of Oswego, the defendant, intending to deceive and defraud the plaintiffs, and encourage them to buy of him the canal boat "Solon F. Case," then lying at or near the city of New York, for the price of $4230, falsely and fraudulently represented that said boat was a quarter deck lake boat with hatches, right in every respect, built in the summer of 1866, of the best material and seasoned timber and lumber, and of the very best workmanship. That the plaintiffs, confiding in such representations, purchased the boat and paid therefor the sum aforesaid. That said representations were false, and that the defendant knew them to be so. The answer contained a general denial, and also a second defense, in which the defendant admitted the sale of the boat, as alleged in the complaint, but denied any intent to deceive or defraud, and denied making any false or fraudulent representations

as to the quality or condition of the boat, the materials used, or the time when the boat was built. The defendant admitted that he represented that the boat was a quarter deck lake boat, summer built, constructed of good materials and well built, and averred that he informed the plaintiff Weed, at the time of the sale, when and by whom the boat was built, and of all the material facts in relation to her construction, and that the statements and representations made by him were believed by him to be true, and were in fact true. The action was tried at the Oswego circuit, in May, 1868, before Justice MULLIN and a jury.

The plaintiffs testified, in substance, that the defendant stated to them that the boat was a very nice one, built of seasoned timber, and for his own use. That she was summer built, and worth from $300 to $500 more than if she had been built in the winter. That she was built upon honor by Mr. Warner, a boat builder of Fulton, who built an extra boat because the defendant assisted him with money when he was in need of such assistance. That the cabin was very nice, and that she was well finished for grain or lumber, and he did not think there was a better boat on the canal. That she had flat hatches.

Lewis Sharp, a witness for the plaintiffs, testified that he was present at the nogotiation, and that the defendant said the boat was a good boat, well built, of good materials, summer built and well finished, except one coat of paint, and that he had paid Warner for that. This witness also testified that he knew what kind of hatches the boat had, and that he told the plaintiffs he thought she was a good boat.

Both plaintiffs testified that they had not seen the boat at the time of the purchase, and knew nothing in respect to her. They also testified that her hatches were not flat, but were roof hatches. The plaintiff Weed testified that he first saw the boat in Troy, about 10th May, and took

her to Oswego with a load of coal; that when he got to Oswego, the seams in her deck were so open that they leaked badly; that her lining was not caulked, and that she was finished up very cheap and plain throughout. The plaintiff Cotton testified that he discovered from the leaking of the decks that they must have been put on in bad weather; that her harpings were only inch and one half or two inch plank nailed with spike; that her lining was not caulked; that she was cheaply built; that her cabins were put up with inch stuff, when it should have been inch and a quarter; that it would cost $75 to change her hatches from roof to flat. Sharp testified that he found the boat cheaply built, and of not very good material; that he could pull oakum from the seams around her bow; that her seams were two large for seasoned timber, and that she was worth $800 less than she would have been if summer built. The plaintiffs' witnesses varied in their estimates of the damages, from $500 to $1000, and one put them at $200. The boat was represented to be a quarter deck lake boat, and it was not disputed that she was such. Her hatches were not flat, but were roof hatches, and the defendant testified that he so informed the plaintiffs at the time of the sale.

The defendant also testified that he told the plaintiffs that she was summer built, and that she had made one trip to New York, with a load of peas, where she then was. That Warner agreed to build him a good boat, and he supposed he had done so. He also testified that he saw the boat frequently during the process of construction; that he made a general examination of the timber which went into her; that none but good timber, and that thoroughly seasoned, was used, to his knowledge; that as far as he could see, the workmanship was good; that she was launched in November; that he examined her after she was launched, and found her in good condition; thought her a well built boat; found nothing out of the

way with her bow stem, harpings or lining, and considered her timbers sufficient for a first class quarter deck lake boat. He testified that the boat was built for his own use, and he thought her as good a boat as was ever built in Warner's yard. Joel B. Warner, a boat builder of forty years' experience, testified that he built the boat for the defendant, in the summer of 1866; that she was launched in November; that all of the materials used in her construction were of the first quality, and were mostly seasoned; that he had the personal supervision of the building of the boat; that her timbers, including her harpings, were of the size and kind usually put into first class quarter deck lake boats; that her bow and stem were well fastened; the lining he called a little extra, being of first quality of pine; the ceiling was two inches in thickness, and was caulked wherever it would leak grain; the workmanship was of the first quality, and she was finished as boats of her class usually are. John W. Pratt, proprietor of another boat yard at Fulton, and a boat builder of over thirty years' experience, testified that he was in Warner's yard several times while this boat was being built, and examined her; that the timber was of good quality and of the usual size; saw no fault in the workmanship, and thought she was well put together. That the harpings are generally of two inch plank, but frequently thinner plank is used, in order that they may be sprung in without breaking. That a boat is called "summer built" when the timber is got out and set up in the summer, though she may not be finished and launched until near the close of navigation in the fall. He also testified that, prior to the spring of 1867, there had never been a better boat of her class than this manufactured in Fulton. Several other witnesses were called, whose testimony tended to substantiate that of Warner as to the quality of the boat.

The court, among other things, charged the jury that,

"in an indictment the criminal intent must be proved, but in this proceeding it is not essential. It is enough that you are satisfied that the representations were made in regard to the material qualities, and that they were untrue at the time, [and] whether they were known to be untrue to the defendant or not, is not material." To this portion of the charge the defendant's counsel excepted, and requested his honor to charge, that "if the jury find that the defendant really believed that the representations made by him in regard to the boat were true, their verdict should be for the defendant." His honor refused so to charge, and to such refusal the defendant's counsel excepted.

The jury found a verdict in favor of the plaintiffs for $500.

R. H. Tyler, for the plaintiffs. I. There is no question raised as to the facts. It is to be presumed that the evidence really taken sustains the verdict. Neither is there any question now before the court on the pleadings, or the admission of evidence. If, therefore, the judge at the circuit did not err in his charge to the jury in the respects excepted to by the defendant, the motion for a new trial must be denied, and the plaintiffs have judgment on the verdict.

II. The judge committed no error in his charge to the jury, or in his refusal to charge as requested by the defendant's counsel. I submit that the charge is sustained in every particular by authority. The representations complained of were not in respect to matters which were latent or concealed, but in respect to matters that might be known, and which were assumed to be known by the defendant, and were unknown to the plaintiffs, because the plaintiffs were not present when the boat was built, and had never seen the boat, and had no opportunity to inspect the boat at the time of the sale. If the defendant

did not know when, how, or of what materials, the boat was built, he should not have made the representations that he did, and for the purpose for which he made them. The effect of the representations upon the plaintiffs was just the same, whether the defendant knew they were false or not. I submit that the charge is sustained both by principle and authority; and if the express charge was right, the refusal to charge as requested by the counsel was also correct. (*See Bennett* v. *Judson*, 21 *N. Y. Rep.* 238.) It seems to me that the case cited is on all-fours with this at bar, and that the doctrine of that case sustains the charge in this, in every particular. The principle that "he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, must answer in damages," especially when the representations are of the character supposed by his honor, has been often affirmed. (*See Stone* v. *Denny*, 4 *Metc.* 160–162; *also Story on Cont.* § 506.) The case of *Binnard* v. *Spring* (42 *Barb.* 470) is entirely different from the one at bar, and is not at all inconsistent with the charge in this case. (*See* 4 *B. Mon.* 601; 1 *Wood. & Min.* 353.)

A. Perry, for the defendant. I. The portion of the charge excepted to by the defendant was erroneous, and the court also erred in refusing to charge as requested by the defendant's counsel. In view of the circumstances of this case, the charge and refusal amounted to an instruction to the jury that the plaintiffs might recover, notwithstanding they should find that the defendant, in making the representations, acted with entire honesty and in good faith. It is insisted that such is not the law. 1. To maintain an action for deceit by means of false representations, it has always been held necessary to aver and prove an intent to deceive. (*Thom* v. *Bigland*, 20 *Eng. Law and Eq.* 467. *Omrod* v. *Huth*, 14 *Mees. & Welsb.* 652. *Freeman* v. *Baker*, 5 *Barn. & Ad.* 797. *Stone* v. *Denny*,

4 *Metc.* 151. *White* v. *Merritt*, 3 *Seld.* 352. *Craig* v. *Ward*, 36 *Barb.* 377. *Zabriskie* v. *Smith*, 3 *Kern.* 322. *Bennett* v. *Judson*, 21 *N. Y. Rep.* 238. *Binnard* v. *Spring*, 42 *Barb.* 470. *Wakeman* v. *Dalley*, 44 *id.* 498.) (*a.*) If the representation is shown to be false to the knowledge of the party making it, that is generally conclusive evidence of fraudulent intent. (*b.*) So if it be shown that the representation was false, and that the party making it had no knowledge on the subject, that would also be evidence of a fraudulent intent. A party who makes a statement as to the truth of which he is in entire ignorance, is as guilty of falsehood as one who makes a statement which he knows to be untrue. So if a man swears to a particular fact without knowing at the time whether it be true or false, it is as much perjury, and equally indictable as though he knew it to be false. (*Lawrence, J., in Rex* v. *Mawbey*, 6 *T. R.* 637.) Upon this principle the case of *Bennett* v. *Judson* (21 *N. Y. Rep.* 238) was decided. In delivering the opinion, Judge Comstock quotes with approbation the language of Story, as follows: "Whether a party misrepresenting a material fact know it to be false, or make the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." (1 *Story's Eq.* § 193.) Judge Comstock adds: "In the case before us the representations of the defendants' agent were proved to be grossly false, and they could not be honestly made when he had not the slightest knowledge of the subject to which they related." 2. The action for deceit cannot be maintained when it is shown that the party making the representation actually believed it to be true at the time, although it turned out to be false in fact. Such representation is not unjustifiable, either in morals or law, and furnishes no ground for an action like this. (*a.*) All writers upon ethics agree that such a statement is

not a falsehood. It is a physical untruth, but has none of the moral qualities of a lie. (*b.*) Such representation is not a fraud in law. The language of Story, above quoted, is "the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable," &c. Parsons says: "If a statement be false in fact, and injurious because false, if it were believed to be true by the party making it, it is not a fraud on his part." (2 *Parsons on Cont.* 774, *5th ed.*) Chitty says: "It would now appear to be settled, notwithstanding some decisions to the contrary, that legal without moral fraud, that is, that a statement false in fact, but not so to the knowledge of the party making it, and not made with intent to deceive, will not invalidate a contract. But if a party, for a fraudulent purpose, states a fact which is untrue, and without knowing it to be untrue, he does not at the time believe it to be true, this is both a legal and a moral fraud." (*Chitty on Cont.* 589, *8th Am. ed. Omrod* v. *Huth*, 14 *Mees & Welsb.* 652.) This was trespass on the case for deceit in the sale of cotton, by sample, upon a representation that the bulk corresponded with the sample. The bulk turned out to be of inferior quality, and to have been falsely packed, though not by the seller. The court charged the jury that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practiced in the packing, or had acted in the transaction against good faith or with some fraudulent purpose, the defendants were entitled to a verdict. They had a verdict, and on writ of error the judgment was affirmed. The court say: "The rule which is to be derived from all the cases, appears to us to be, that where upon the sale of the goods the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the

representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action." (*Taylor* v. *Ashton*, 11 *Mees. & Welsb.* 401.) In this case Parke, B., said, in the course of the argument, "I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud. If the party *bona fide* believes the representation he made to be true, though he may not know it, it is not actionable." (*Id.* 413.) *Moens* v. *Heyworth* (10 *Mees. & Welsb.* 155) was an action for deceit in the sale of coffee, in which the sellers exhibited an invoice which stated the coffee to be of "first shipping quality," which was false. Lord Abinger said: "The fraud which vitiates a contract and gives the party the right to recover, does not, in all cases, necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true." To sustain this view, he referred to the rule in cases of policies of insurance, as if the same rule applied to the case before him. But Parke, B., who delivered the prevailing opinion, said: "The case of a policy of insurance does not appear to me to be analogous to the present. Those instruments are made upon an implied contract between the parties, that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds." He adds: "To give a right of action for the representation, it was, I think, essential to prove that, by words or acts of the defendants or their agents, it was made falsely and for the improper purpose of inducing the plaintiffs to purchase the goods. I think it essential that there should be a moral fraud, and indeed all the cases

show that it is." *Stone* v. *Denny* (4 *Metc.* 151) was an action on the case for deceit, charging that on a sale to the plaintiff of an undivided half of the stock and property of a woolen factory, a schedule exhibited by the defendant was false, but was represented by him to be true and correct. The head note is: "Though a representation made by a vendor respecting goods sold by him be not true in fact, yet if he believe it to be true, it is not a ground of action by the vendee against him for fraud in the sale." *Hubbard* v. *Briggs* (31 *N. Y. Rep.* 518) was an action on the case for alleged fraud in making false representations concerning the solvency of the Millers' Bank of Clyde, whereby the plaintiff was induced to subscribe $5300 to the stock of the bank, and give his bond and mortgage for the amount. The defendant was a stockholder and director, from the organization to the failure of the bank, and by express agreement was individually liable for its debts to a large amount. Wright, J., in delivering the opinion of the court, says: "If the defendant ignorantly asserted a lie in his effort to induce the plaintiff to become a subscriber to the stock of the bank, and honestly believed that its condition was as he represented it to be, he would not have been liable." (*Id.* 530.) In *Craig* v. *Ward*, (36 *Barb.* 377,) the court charged the jury that if the representations made to the plaintiff were untrue, although the defendant did not know they were so, yet if he was informed and knew of facts which, in the exercise of common sense and ordinary prudence, were sufficient to put him upon inquiry, and would have led him to a knowledge of the condition of the title, he would be liable, the same as if he had actual knowledge. The court held an exception to this part of the charge not well taken. They say: "It (the exception) does not involve the proposition of his liability, in case he actually believed the representations to be true at the time. It carefully excludes that fact, and only raises the question as to whether a party making a representation false in

fact, should actually know it to be so, to render himself liable in an action for fraud. (*Id.* 385. *See also Haycraft* v. *Creasy*, 2 *East*, 92; *Tryon* v. *Whitmarsh*, 1 *Metc.* 1; *Russell* v. *Clark*, 7 *Cranch*, 69; *Lord* v. *Goddard*, 13 *How. S. C. Rep.* 198.) 3. There was abundant evidence in the case tending to show that the defendant believed, and had reason to believe, that the representations made by him were true; and from the cases above cited it seems clear that the question, whether he did so believe or not, should have been submitted to the jury. 4. The charge of the court in this case cannot be sustained upon the doctrine that a party who makes a representation, alleging it to be true of his own knowledge, which is false in fact, is to be deemed guilty of fraud, whether he knew it to be untrue or not. (*a.*) This rule applies only to cases in which the subject of the representation is one of which absolute and accurate knowledge may be predicated, and not to those in which the subject of the representation is more or less matter of opinion. The rule that a false representation made by a party who is entirely ignorant on the subject is deemed fraudulent, applies equally to matters of fact and of opinion. To illustrate: A man represents a horse to be sound, (more or less a matter of opinion,) which he has never seen or examined. The horse is in fact unsound. It is fraud. If, however, he has used and examined the horse and really believes him to be sound, he is not guilty of fraud, though the horse be in fact unsound. On the other hand, if he affirms that he knows the horse to be but five years old, (a fact of which accurate and positive knowledge is predicable,) and the horse is ten years old, it is fraud, although he may have examined the horse and might have ascertained his true age; for he affirmed that he had knowledge when he was aware that he had no such knowledge. But if he affirmed that he knew the horse to be sound and the horse was

unsound, from a secret defect which from examination and use of the animal he had been unable to discover, and the party really believed the horse to be sound, he is not guilty of fraud. His affirmation is deemed but a strong expression of opinion, and must have been so understood by the purchaser. The adjudged cases recognize these distinctions. (*Hazard* v. *Irwin*, 18 *Pick.* 95. *Stone* v. *Dewey*, 4 *Metc.* 151; and see on pages 156, 7, the comments of Judge Dewey upon the case of *Hazard* v. *Irwin*. *Thomas* v. *McCann*, 4 *B. Munroe*, 601. *Haycraft* v. *Creasy*, 2 *East*, 92. *Tryon* v. *Whitmarsh*, 1 *Metc.* 1.) (*b.*) The representations alleged to have been made by the defendant in this case were all very general, relating to matters of opinion, as to which honest men possessing equal information might well differ, with the exception of that in regard to the hatches. The defendant denies that he represented the hatches to be flat, and whether the jury believed him or the plaintiffs is uncertain. At any rate, the difference claimed between the value of flat and roof hatches was only $75. Whether or not a canal boat is "nice" or "good" or "well built," or built of "good materials," whether or not she is "finished up complete," and whether or not the timber is "seasoned," are all, to some extent, matters of opinion, involving many degrees of variation, in respect of which men may honestly differ. The same is true of the question whether or not the boat was "summer built." Was the defendant to be understood as affirming that she was wholly built and launched during the three summer months, or did he use the term in the sense in which builders and dealers use it, i. e., as distinguishing from a boat built in winter? It would seem that Weed understood it in the latter sense, (see his testimony;) and if so, the representation was strictly true. (*c.*) The court did not submit to the jury the question whether or not the defendant made the representations as of his own

knowledge. That should have been done, at least. (*Hazard* v. *Irwin*, 18 *Pick.* 95. *Stone* v. *Denny*, 4 *Metc.* 151, *and other cases cited under* 1*st sub. of* 4*th point.*)

II. The verdict should be set aside and a new trial granted.

By the Court, BACON, P. J. This action is founded on an allegation of deceit in the sale of a canal boat. The express averment of the complaint is, that the defendant, intending to deceive and defraud the plaintiffs, falsely and fraudulently made certain representations in respect to the quality and condition of the boat, in which the plaintiffs confided, and were thereby induced to make the purchase; and that these representations were false, and the defendant knew them to be so. The evidence on the trial was given with a view to sustain these allegations, and damages were claimed for the fraud thus charged to have been perpetrated upon the plaintiffs.

The rules of law applicable to an action seeking to recover damages for fraud and deceit in sales of property, have been long settled, and are very familiar to the courts. In the celebrated pioneer case of *Pasley* v. *Freeman* (3 *T. R.* 51) it was held that a false affirmation made by a defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action on the case in the nature of deceit; the principle being that fraud and deceit, accompanied by damage, is a good cause of action. This case has been uniformly followed by the courts in England and in this country, and, as Judge Wright says, in his opinion in the case of *Hubbard* v. *Briggs*, (31 *N. Y. Rep.* 529,) it is not controverted, now, that where a person asserts a falsehood with a fraudulent design, and damage results therefrom, though he may have no interest even in the deception, it is good ground for a civil action. Intentional and purposed deception is consequently the very gist of this action, and this must in

some way be made to appear, or no legal claim for damages is laid.

In closing his charge in this case, it seems to me the learned judge lost sight of this principle; for he told the jury that in this action it was not essential to prove any criminal, that is, wrong intent; that it was enough that the representations were untrue, whether known to be so or not. He was then asked to charge this specific proposition: "If the jury find that the defendant really believed that the representations made by him in regard to the boat were true, their verdict should be for the defendant." This direction was refused, and the defendant's counsel excepted. I think in this refusal the judge erred. This is not like the case of *Bennett* v. *Judson*, (21 *N. Y. Rep.* 238,) which the plaintiffs' counsel supposes to cover and sustain this charge. That case has always been considered to have carried the doctrine of liability for an alleged fraudulent representation to the extremest verge of the law, and the courts have been very careful to discriminate and apply it only to the state of facts presented by the case itself.

In that case the representations were made in regard to the quality and condition of property which the defendant, or rather his agent, who made the representations, had never seen, and personally had no knowledge of whatever; and in reference to that case, Judge Comstock, citing a passage from *Story's Equity Jurisprudence*, held that if a party make an assertion without knowing it to be true, he is as responsible as if he made the assertion knowing it to be false. The liability was made to attach to one who undertook to assert as a fact a thing of which he had no knowledge whatever, and in respect to which he could not have even a belief; for he had no material on which a belief could be founded, and there was no room for a claim that, although mistaken, he still may have acted in good faith. The statements on which the

purchaser relied were made in respect to what the party making them assumed to know, not what he had heard, or had reasonable ground to believe. In the same passage, quoted by Judge Comstock, occurs this important qualification: "for the affirmation of what one does not know, *or believe to be true*, is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false." This is a very important distinction, and is always to be kept in view in cases of this character, where a fraudulent intent is charged.

If a party has knowledge of the character and condition of the property with which he is dealing, and makes a representation which turns out to be false, the motive with which that representation is made is all-important when he is sought to be made responsible on the ground that he perpetrated a fraud; and the fact whether he really believed, or had any justifiable reason for believing that what he said was true, is a most legitimate subject of investigation, and upon that, as in all those cases of imputed fraud, where the motive is the subject of inquiry, the party charged with the fraudulent intent is permitted to be heard. The inquiry which the proposed instruction invited, whether the defendant really believed that the representations he made were true, was one entirely competent, as bearing legitimately and directly upon the fraudulent intent charged. The jury may not have credited the claim thus sought to be made on the part of the defendant; nevertheless, as matter of evidence, it was competent, and the defendant was entitled to have their judgment upon the question of his good faith, which was the essential issue in the case.

I do not think it important to go through the cases, a large number of which have been cited by the defendant's counsel to sustain his view. The principle is asserted in a variety of forms; that principle being that in order to

maintain an action for deceit by means of false representations, it is always necessary to aver and prove an intent to deceive; and that whenever a party actually believes what he asserts to be true, he is not liable, although it turns out that what he affirmed was false, in fact. This is clearly and pointedly expressed by Wright, J., in the case of *Hubbard* v. *Briggs*, cited *supra*: "If the defendant ignorantly asserted a lie in his effort to induce the defendant to become a subscriber to the stock of the bank, and *honestly believed* that its condition was as he represented it to be, he would not have been liable." So in *Stone* v. *Denny*, (4 *Metc.* 151,) the court held that though a representation made by a vendor respecting goods sold by him be not true in fact, yet if he believe it to be true, it is not a ground of action by the vendee against him for fraud in the sale. Without a further citation of cases, many of which will be found in the English reports to the same effect, I am in favor, for the error in refusing the instruction asked, of granting a new trial, with costs to abide the event.

MULLIN, J., dissented.

New trial granted.

[ONONDAGA GENERAL TERM, January 5, 1869. *Bacon*, *Foster*, *Mullin* and *Morgan*, Justices.]

JOHN REAL, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

Although the statute directs (3 *R. S.* 303, §§ 6, 7, *5th ed.*) that courts of sessions shall send all indictments, not triable therein, to the next court of oyer and terminer, there to be determined according to law; and that such courts may, also, by an order to be entered in their minutes, send all indictments for offenses triable before them, which shall not have been heard and determined, to the next court of oyer and terminer, to be there determined according to law, it does not necessarily require that the prisoner shall be tried during the next session of the court, and if not then tried, that he shall not be tried at all.

The language of the statute does not necessarily require that the trial shall take place at any particular term or session; but still leaves the control of the calendar with the presiding judge; who retains the power which every judge necessarily possesses, of reserving the case, or postponing the trial for another term or session, as the exigencies of the occasion, or as justice may require.

Hence it is not necessary that the judgment record should show, on its face, when the next term of the court of oyer and terminer was held, after an indictment was sent to that court by the court of sessions.

Evidence of what the prisoner said to a policeman, the day after being arrested for the offense, is inadmissible; such declarations being no part of the *res gestæ.*

The mere apprehension of danger, followed by no *overt* act, does not justify the killing of the person from whom the danger is apprehended. Hence, on the trial of an indictment for murder, evidence of what the deceased had said to the witness about the prisoner, some time previous to the commission of the offense, is inadmissible, when offered for the purpose of showing, with other facts, whether, at the time of the occurrence, the prisoner was justified by the circumstances, in apprehending danger from the deceased.

Nor will previous bad treatment, any more than previous threats, justify homicide. Therefore, evidence to show the previous cruelty of the deceased, to the prisoner, in clubbing him when nearly insensible from intoxication, is inadmissible.

Although a prisoner may show that at the time the offense was committed he was laboring under *delirium tremens*, the opinion of a non-professional witness as to the general soundness or unsoundness of the prisoner's mind a short time before the commission of the offense, is inadmissible.

On a trial for murder, the counsel for the prisoner offered to prove that the prisoner was addicted to hard drinking; that he sometimes drank to great excess, and continued on drunken sprees for days and weeks at a time, and had had delirium and insanity. In reply to a question of the court, the counsel stated that he did not propose to show by the witness that within

two or three days previous to the homicide the prisoner had one of those fits on him; but proposed to lay a foundation to prove it. The court ruled out the question; afterwards telling the counsel that if he could show that the prisoner had *delirium tremens* at or about the time of the homicide, he could show it by this or any other witness. The counsel remarked that he proposed to show the drinking, first. *Held* that the question was properly ruled out.

Where a witness, having admitted, without due exception on the part of the prisoner's counsel, that he had been in the penitentiary, was asked how long he was there; *Held* that this was not calling for proof of his conviction, which could be proved only by the judgment record; and that he having admitted, without exception on the part of the prisoner's counsel that he had been there, an answer showing the duration of the time of his imprisonment was, if it was capable of producing any effect, calculated merely to disparage him, and was therefore admissible.

Where an indictment charged, in substance, that the prisoner made an assault, and with a pistol charged and loaded with gunpowder and a leaden bullet, fired at the deceased, and then and there feloniously &c. did strike, penetrate and wound the deceased with the leaden bullet, causing a mortal wound, of which he died; *Held* that this the prosecutor was bound to prove; but it mattered not which of the bullets, and which of the wounds, caused the death of the deceased.

Accordingly *held* that the court did not err in refusing to charge the jury that if the proof failed to show which wound it was that actually killed the deceased, the case was not made out according to the indictment.

The doctrine that the court shall disregard any error or defect in the pleadings or proceedings which has not affected the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect, is salutary and just, equally in criminal as in civil cases.

WRIT of error to the court of oyer and terminer for the county of New York, to review a conviction for murder in the first degree.

The indictment was for killing John Smedick, a patrolman, in the city of New York, on the night of July 23, 1868. It was found in the following month, in the court of sessions, and was, on the 6th of August, 1868, on motion of the district-attorney, sent to the court of oyer and terminer for trial, where it was tried, at the February term, 1869, before Hon. GEO. G. BARNARD, justice, and a jury.

Various exceptions were taken, on the trial, which are

stated in the opinion of the court and in the points of the prisoner's counsel.

B. K. Phelps, *S. H. Stuart* and *John Graham*, for the plaintiff in error. I. The judgment record shows that the indictment was presented in the court of general sessions, for this county, on the first Monday of August, 1868; that it was ordered into the court of oyer and terminer on August 6, 1868, and that it was sent to, and received by, the latter court on February 1, 1869. The record says, as the statute required, (3 *R. S.* 303, § 7, *5th ed.*,) that the indictment was ordered to be sent to the next court of oyer and terminer to be held, &c., to be there determined according to law. It is not alleged that the next court of oyer and terminer sat on February 1, 1869, and it was conceded on the trial that the next court of oyer and terminer sat in October, 1868. The right of the court of oyer and terminer to receive and entertain the indictment, depended upon its being the next court of oyer and terminer after August 6, 1868. (*Banks* v. *Goodwin*, 3 *Best & Smith*, 548. 113 *Eng. Com. L.* 546.) Even assuming that if the indictment had been received by the next court of oyer and terminer in this county, (i. e. in October, 1868,) it could have continued the indictment for trial to February 1, 1869; it could not begin a jurisdiction in February, 1869, which the statutes imperatively said must commence in October, 1868. This defect appearing upon the face of the judgment record, is available upon a writ of error. (1 *Chitty's Cr. Law*, 751, 752, *m. p.*) As to objection to jurisdiction, when to be taken advantage of, see *The Queen* v. *Heane*, (4 *Best & Smith*, 947; 116 *Eng. Com. L.* 945;) *McCann* v. *The People*, (6 *Park. Cr. Rep.* 629.) The court of oyer and terminer is a permanent and continuous court, existing in its appointed and stated terms. (*Quimbo Appo* v. *The People*, 20 *N. Y. Rep.* 531.) If the term after the next term would satisfy the statutes and the order of the general ses-

sions, time would be entirely unimportant, and the whole future would remain open to comply with the duty. As the statutes create the right of transmission from one court to another, the details they prescribe are the only true mode.

II. The same ground was virtually taken by the prisoner's counsel, at the outset of the trial, as an objection to the right of the court to proceed with the trial, and is presented upon an exception to the adverse ruling of the court.

III. The judgment record should have shown, on its face, when the next term of the court of oyer and terminer in this county sat, after August 6, 1868. This it does not do. One great object of the record is to make it appear that from first to last, in the condemnation of the prisoner, *servato juris ordine.*

IV. The court, at the trial, erred in preventing the prisoner's counsel asking officer Mee, who made the arrest, what reason the prisoner assigned for his act. It will be seen that the officer was not positive that the prisoner did not state the reason to him on the night, and at the time, of the arrest. He knew that the prisoner told him the reason, but he would not be positive as to time. It may have been the night of the arrest, or the next day—as likely the former as the latter. The officer had previously stated that the prisoner admitted the deed, in a way not likely to help him, if he was in a perfectly sane state of mind. It was all important, therefore, to furnish to the jury some kind of counteractive for this admission. The language of the prisoner's counsel, in seeking to introduce in evidence the reason for the deed, as given by the prisoner, was as follows: "Now I ask permission that I may ask the witness what the prisoner said the next day." The meaning of this was, that permission was desired to ask the witness what reason the prisoner assigned for his act, because it was as fair, from officer Mee's testimony, to presume that he said it on the night, and at the time

of the arrest, when he admitted the act itself, as that he said it the next day. It may be that the two things were a part of the same conversation, and if they were, as the prosecution had introduced one, the defense were entitled to bring in the other. The court had no right to assume that the reason for the act was not stated by the prisoner until the next day, because that was saying what the witness was unwilling to testify to. The evidence should have been received, and when the court came to charge the jury, it should have told them that they should entertain it, or not, according as they believed the reason for the prisoner's act was a part of the conversation the prosecution had called for, or not. The peculiarity of the prisoner's situation must be kept in view. If the evidence of James Rowe and Thomas Mulhare, for the defense, was at all true, on the day of this homicide the prisoner could not have been in his right mind. Was the craziness he gave vent to, on the night of his arrest, to come in judgment against him, unrelieved by what he said on the following day, assuming, but not conceding, that he assigned no reason for his act until the following day? Our ground is this; that the John Real who acted and spoke on the night of this occurrence, was not the real John Real; that it was a man who had been him once, and might likely be him again, but who, at the time of the homicide, was so frenzied and maddened from some cause or other, that, if the law visited accountability upon him for his *hand*, it did not allow him to be prejudiced by his *tongue*. Captain Allaire admitted he was very much excited in the station-house. What was he excited about? Was it frenzy—madness? Or was it an excitement the deceased had thrown him into, by the provocation which produced the death of the deceased? Does the law receive the statement of a man who knows not what he says, and not allow it to be offset or qualified by what he may say when it is safer to assume that reason has more or less

control over him? There may be some doubt as to whether, assuming the prisoner to have been perfectly rational on the day and night of the homicide, what he said at the station-house, when he had been arrested and carried there by an officer on a charge of murder, could be proved against him. He was then under examination by the sergeant at the desk. *The People* v. *McMahon* (15 *N. Y. Rep.* 384) is a controlling authority upon this point, where the party accused has been sworn as a witness, and his previous statement is invoked against him upon his trial. If a sworn statement is inadmissible under such circumstances, it is difficult to see why an unsworn statement ought not to be, when the principle of the rule is, that what a person so situated says is entirely unreliable, from the hopes and fears necessarily crowding his bosom. Although the prisoner's counsel did not except to the reception of what he said at the station-house, if there is a doubt as to whether the evidence was proper, it is good to strengthen the present point. The case of *The People* v. *Wentz*, (37 *N. Y. Rep.* 303,) involving the principle of the competency, as evidence, of confessions to a policeman, contains the latest law on that subject.

V. The next exception in order arose under the following circumstances: Bernard McGill, a witness for the prisoner, was asked to state what the deceased said to him about the prisoner in the latter part of June, or about the first of July, 1868, at which time the witness stated he had a conversation with the deceased, relative to the prisoner. When this question was put to the witness, the record discloses the following state of facts: (District-attorney objects.)

"Mr. Phelps. We offer to show this for the purpose of showing, with other facts, whether, at the time of this occurrence, this prisoner was justified by the circumstances in apprehending danger from the officer—whether he had any reason which, in his position, entitled him to

apprehend any danger from the officer at the time of the shooting."

"The Court. I do not think that would be proper."

"Judge Stuart. We offer to connect a knowledge on the part of the prisoner with the fact that the witness told the prisoner what Smedick had said, (so that when this event occurred he was advised of what Smedick had said about him.")

"The Court. The greatest extent to which that rule was ever carried was in a charge that I delivered to the jury in the case of *The People* v. *Cunningham*. I there charged the jury that they had a right to show the character of the deceased as a fighting man, as a wicked man, a blood-thirsty man, accustomed to carrying knives, accompanied with threats to take the life of Cunningham, provided they brought that knowledge home to Cunningham."

"If you can prove that this man said he was going to take his life, and that information was given to the prisoner, you can prove it."

"Judge Stuart. We propose to prove that the deceased had complained of the prisoner, had beaten him pretty near to death, had locked him up in prison and sworn falsely against him; and that, when he got out of prison, he said, 'The son of a bitch, is he out? I will fix him; I will have him there to-night again;' and acting upon that, he pursued the prisoner. We will show that this witness was informed by Smedick of what he intended to do, and that he communicated it to this prisoner."

"The Court. I think this evidence at the present time is proper; and I did not intend to state to the jury, before charging them, what the law is on that subject. It is not as has been stated by the counsel for the prisoner, but is this: If information had been conveyed to the prisoner, the day before, that the police officer intended to arrest him, and put him in prison wrongfully, and he

thereupon armed himself and shot the officer, it is murder." To which the counsel for the prisoner excepted.

It appears from this extract from the record, that while the evidence was going on the court thought it necessary to give the first installment of its charge to the jury. In its first remark to the prisoner's counsel, the court really intimated to the jury that unless the deceased was like Cunningham—a fighting man, a wicked man, a bloodthirsty man, accustomed to carry knives, and had made threats against the prisoner's life, which had been communicated to the prisoner—the proof was incompetent; but when the prisoner's counsel made the propriety of their offer more plainly manifest, the court, while it allowed the proposed evidence, assumed to charge the jury in advance in reference to it.

Can it be law, as the court told the jury, (for it addressed itself to them,) that if the prisoner was informed that the deceased intended to arrest him, and put him in prison wrongfully, and the deceased meant to do it, (for that is the implication of what the court said,) and the prisoner thereupon armed himself and shot the deceased when he attempted to execute his threat, it was murder? What end can there be to official outrages, if this is law? The remark of the court appeared to be intended as a miniature of the most favorable state of facts the defense could present, and warned the jury, by way of anticipation, not to be impressed by it, as the prisoner's act was still murder.

It is not meant, in these suggestions, to overlook the law laid down by the Court of Appeals in *The People* v. *Clark*, (3 *Seld.* 385,) and *The People* v. *Sullivan*, (*Id.* 396,) that the design to kill constitutes murder in the first degree, whether it be formed months, or just before the commission of the act producing death. It is incontrovertibly settled in this State, at this time, that it is sufficient if the intent *antecedit ictum licet non congressum.* Still

this principle is to be understood reasonably, and is most happily presented in the opinion of Brown, J., in *The People* v. *McCann*, (16 *N. Y. Rep.* 58, 66, 68.)

In *Wilson* v. *The People*, (4 *Park. Cr. Rep.* 619,) in which Wright, J., delivered the opinion of the general term of the Supreme Court, the question of what justifies "heat of passion" is most perspicuously considered and ably handled. The judge, at the trial, had charged the jury that the use of words alone, even of the most aggravated character, would not be allowed, in law, to produce that "heat of passion" which, under the Revised Statutes, reduced an act of killing to manslaughter. Wright, J., in allusion to this instruction, expresses the convictions of the court in this language, (page 648:) "Was the law, therefore, in this respect, correctly expounded? I think not. The law, respecting the infirmities of our nature, attaches a less degree of criminality to acts of violence perpetrated under an excitement provoked by the assailed. The passions may be heated as effectually by words as by acts; and an assault may be provoked oftentimes as readily by the former as the latter. In cases of assault of the person, it has always been held that provocation by words has gone far to mitigate the legal wrong. It cannot be that the accused must always show a combat and a sufficient provocation. It is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and it matters not whether this state is produced by acts or words, if either the one or the other are naturally calculated to produce it." May not the deceased have provoked the prisoner by words, if not by violence? In the American Law of Homicide, (*Wharton*, 203,) it is stated as an elementary principle, in reference to restraint or coercion by a public official, that an illegal attempt to restrain a man's liberty, even under color of legal process, is such a provocation as to reduce the offense to manslaughter. The remark of the court below

was, that if the prisoner "thereupon (meaning on being informed of the threat of the deceased) armed himself and shot the officer, it is murder." Suppose this had been stated to the jury in the final charge, could it have been defended? Are the jury told that before the shot was fired, a design to kill, or premeditated malice, must have existed? The sting of this remark was not taken out of it by the final charge. The remark was, that to arm after the prisoner was informed of the threat, though he may have fired his pistol without a design to kill, was murder. The mere arming, if death followed, was murder. Is it not possible that though a man arm himself to repel menaced violence, he may, nevertheless, use his weapon with the same accountability, and no greater, as if he had had a weapon accidently about him when unexpected violence was inflicted upon him? On looking at the charge to the jury, it will be found that the attention of the jury was drawn exclusively to the crime of murder in the first degree. No definition of any other offense was given to them, unless it was when they were told that self-defense would reduce the act to manslaughter in the fourth degree. The trouble was that the jury were told they must either convict of murder in the first degree, or acquit altogether. That is the meaning of the charge. No intermediate point was given to them. Not feeling at liberty to acquit, they thought a recommendation to mercy would prevent death. Had the degrees of manslaughter been defined to them, it would have been different.

VI. The court, at the trial, erred in excluding the offer of the prisoner's counsel to show the previous cruelty of the deceased to the prisoner—clubbing him inhumanly on July 8, 1868, when almost insensible from intoxication—to justify an apprehension of similar treatment from the deceased at the time of the homicide. The ground of exclusion was that the defense could not "show isolated transactions of that kind." Carpenter, the principal wit-

ness for the prosecution, who pretended that he saw a portion of the affray from a stand-point of from twelve to twenty feet off, does not testify that no words passed between the deceased and the prisoner, or that he saw what happened between them, after he passed them. He did not remember hearing words, and did not know whether they spoke. They might have spoken, notwithstanding. In excluding the offer of the defense, by the witness McDonald, the court ruled directly against what it had previously ruled, in reference to the testimony of Mr. McGill. If it was competent to prove the threats of the deceased against the prisoner, was it not competent to prove the brutality of his conduct towards him? Two great principles must be here noted. *First.* "It is always a just argument, on behalf of one accused, that there is no apparent motive for the perpetration of the crime. Men do not act wholly without motive." (*Per Woodruff, J., in Kennedy* v. *The People*, 39 *N. Y. Rep.* 245, 254.) *Second.* "Our laws are not specially framed to shield guilt from detection. They exclude nothing legitimately connected with the *res gestæ* of crime. In cases of this nature such proof is uniformly received, and it is equally admissible whether it tends to inculpate or exonerate the party accused." (*Per Porter, J., in The People* v. *Gonzales*, 35 *id.* 49, 64.) In the *American Law of Homicide*, by Wharton, (*p.* 217,) it is stated as an elementary and familiar rule, that "it is admissible for the defendant (i. e., on a trial for murder,) to show threats, or other circumstances of a recent character, which would tend to make a man of his character believe that his life was in danger." (1 *Archb. Cr. Pr. and Pl., ed. by Waterman, of* 1860, *p.* 901. *The People* v. *Henderson*, 28 *Cal. R.* 465.) On looking at page 249 of the same work, it will be perceived that any difficulty on this subject arises out of the inquiry as to whether the courts should permit the accused, on trials for homicide, to assail the general character of the deceased "for peace and order," where it is alleged that

the accused, "from all the circumstances of the case, had reason to be in fear of his life." (*Id.* 401, *in notis.*) The right to show particular malice—that which leveled itself directly at the accused—instead of constructive malice, which proceeded from a general ruffianly disposition, and involvod the whole world, is not questioned. (*Ben* v. *The State*, 37 *Ala. R.* 103, *N. S.*) In *Pfomer* v. *The People*, (4 *Park. Cr. Rep.* 558,) the counsel for the defense, on the trial, claimed the right to prove the general disorderly and offensive character of the deceased, without connecting a knowledge of it with the prisoner. The court decided to allow the testimony, if coupled with the offer to show that the fact was known to the prisoner; otherwise, excluded the testimony. On a verdict for manslaughter, the case was brought before the general term of this court, where the judgment was reversed on another ground; but the argument of the prisoner's counsel as to the point stated is reported *in extenso*, and will be conceded upon a perusal to be marked by great research and distinguished ability. The district-attorney conceded that the ruling of the court at the trial, with the restriction it imposed, (the bad character of the deceased being brought home to the knowledge of the accused) was good law. (*Id.* 589.) In *The People* v. *Rector*, (19 *Wend.* 569,) on a trial for murder, it was held per Nelson, Ch. J., and Cowen, J., (Bronson, J., dissenting,) where it appeared that the deceased sought to gain admittance into a house of ill-fame by violence and against the will of the keeper thereof, who made an attack upon the aggressor, and death ensued, that testimony that threats had been made a week previous to the assault, by persons who had broken into the house, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the court; although it seems that for the rejection of such evidence, where it was not shown that the deceased was of the party who made the threats,

a new trial would not be granted. If the deceased had been shown to be of the party making the threats, a new trial would have been granted as a matter of right. Cowen, J., (*Id.* 590,) says: "It did not appear that he (the prisoner) knew the deceased and his companions, so as to distinguish them from the previous rioters. * * * The lightness of a relevant circumstance is no argument for withholding it from a jury. (*Id.* 591.) * * * In the prosecution of a crime so essentially the creature of intent as murder, everything pertinent should be submitted to the jury upon which they may infer an absence of malice." (*Id.*) Nelson, Ch. J., speaking of the proof having been offered to show that the prisoner, under the influence of an apprehension of violence upon his dwelling and its inmates, had used a degree of violence which was excusable, though otherwise it might have been disproportioned to the actual danger, says: "that the law regards this sort of palliation for an excess of resistance, in case of an unlawful assault upon the person or property of the citizen, is not denied." (*Id.* 614.) In *The People* v. *Lamb*, (2 *Keyes*, 360, 366,) Davies, Ch. J., sustains the doctrine he had ruled in *The People* v. *Pfomer*. He also enunciates the principle that the general character of the deceased can be attacked, and that he can be shown to have been disorderly, violent, dangerous or blood-thirsty, under the decisions he consulted, where it appeared that he had assaulted the prisoner, or threatened to assault him at the time of the homicide, ("or so immediately preceding it, or so intimately connected with it,") in such a way as to justify the apprehension of great, impending and imminent bodily harm. (*Id.* 365, 371.) In that case the Court of Appeals affirmed the judgment of the general term of the Supreme Court in this district, granting the prisoner a new trial, although, from the opinions delivered, it cannot be gathered which of the grounds considered in them was meant to be passed upon by the court. In *Jewett* v. *Ban-*

ning, (21 *N. Y. Rep.* 27,) it was held that "in an action for an assault and battery, committed in the absence of witnesses, ill will on the part of the defendant towards the plaintiff is admissible as a part of the circumstantial evidence "to determine by whom the assault was committed." If ill will generates a rule of evidence in the civil courts, why does it not also in the criminal courts? If it becomes a make-weight in the scale in the former class of cases, why does it not also become one in the latter?

VII. The court, at the trial, erred in excluding the questions to James Rowe, a witness for the prisoner, as to the impressions the acts and words of the prisoner made or left upon his mind, when he had the conversation, and walked with the prisoner, between five and eight o'clock, on the afternoon or evening previous to the homicide. The rule is thus stated by Porter, J., in *Clapp* v. *Fullerton*, (34 *N. Y. Rep.* 190, 194, 195:) "When a layman is examined as to facts, within his own knowledge and observation, tending to show the soundness or unsoundness of the testator's mind, he may characterize as rational or irrational the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it to fortify the force of the facts, and the adverse party may demand it as a mode of probing the truth and good faith of the narration. But to render his opinion admissible, even to this extent, it must be limited to the conclusions from the specific facts he discloses. His position is that of an observer, and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question, whether the mind of the testator was sound or unsound." This same rule was restated and reapplied in *O'Brien* v. *The People*, (36 *N. Y. Rep.* 276, 282.) It is now the settled law of this State.

VIII. The court, at the trial, committed a similar error in excluding the questions to Thomas Mulhare, another witness for the prisoner, who testified to facts occurring before and up to half-past six o'clock on the afternoon of the occurrence in question, utterly inconsistent with any other idea, if true, than that the prisoner was not right in his mind. It cannot be insisted that the exclusion of these questions did not prejudice the prisoner, for why did the prosecution object to the answers, if they were not damaging to their interests? Why not receive the evidence, if it was unimportant?

IX. The court, at the trial, erred in excluding the following question to Patrick McCauley, the prisoner's brother-in-law, who had been familiar for the last fifteen or sixteen years with the prisoner's habits of intoxication or drinking to excess, namely: "What have been his habits lately as to excessive drinking?" At the time this question was put, the evidence of Mr. Rowe and Mr. Mulhare had been given. It proved a condition of mind on the part of the prisoner, on the evening before, and on the very afternoon of the occurrence, certainly not very rational, if it did not amount to absolute mental derangement for the time being. The effect having been proved, the cause necessarily became relevant. The latter would have enabled the jury to have judged of the extent and intensity of the former. In *O'Brien* v. *The People*, (*supra*,) delirium tremens is accepted by the court as actual insanity, occasioning irresponsibility for the conduct of a party while it lasts. If the proof failed to draw the case up to that standard, the state of the prisoner's mind became important as showing whether the expressions he made use of or uttered (as alleged by the prosecution) at the time of his arrest, were really understood and meant by him, or were the promptings of an intellect totally or partially shattered by previous dissipation or indulgence. Insanity is predicable of such a state of mind on the part of a person

charged with homicide, as prevents his knowing "that the deed was unlawful and morally wrong." (*Per Denio, Ch. J., in Willis* v. *The People*, 32 *N. Y. Rep.* 715, 719.) It would not be wrong to say that a person was insane who did not know right from wrong at the time of the homicide, and that the act he was committing was a violation of law, and wrong in itself. (*Id.*) The dialogue between the court and counsel for the prisoner is somewhat lengthy at this point, but it amounted to a positive refusal by the court to allow the question as to the habits of the prisoner lately as to excessive drinking to be put, and an exclusion of the fact of intoxication at the time of the homicide. If the remark of the court, "If you can show that he had the delirium tremens at or about this time, you can show it by this witness or any other witness," cured the two previous exceptions for the prisoner at this stage of the trial, on this subject, it did not affect them so far as they embraced the two facts mentioned. As to the excessive drinking, what so perfect a way of establishing delirium tremens, as to show the habits claimed to have begotten the disease? The prisoner's counsel wanted to prove "that he was addicted to drinking; sometimes drank to a great excess, and continued on drunken sprees for days and weeks at a time, and then sobered down, and had a delirium and insanity." Should not the cause have preceded the effect, in the order of testimony? The excessive drinking was the cause; the insanity the effect. Did it not corroborate Rowe and Mulhare, to prove that the conduct of the prisoner, as they witnessed it on the night before and the day after the occurrence, had no actual foundation to rest on; that the prisoner must have been in the condition they described, unless excessive drinking had been shorn of its power or influence? It is difficult to see why the court kept out evidence as to excessive drinking. It is certain, however, that it did, unless, so far as it allowed delirium tremens to be established, excessive drinking was involved

in the establishment of that fact. As to the prisoner's intoxication at the time of the alleged offense, the exception to the decision of the court is perfectly fatal. He had the undeniable right to show it, if three decisions of the Court of Appeals can create such a right. In *The People* v. *Eastwood* (14 *N. Y. Rep.* 562, 565) the doctrine is distinctly upheld by the Court of Appeals, that where a party charged with murder has indulged in threats or violent language, the fact of intoxication is receivable on the point of whether the threats and language used were the deliberate words of a sober and bad man, or the idle and coarse language of a drunken man. In *The People* v. *Rogers* (18 *id.* 9) the doctrine is distinctly approved by Denio, J., in his opinion, (*p.* 18,) with the views of which the members of the court unanimously concurred, that drunkenness or intoxication is admissible to show that a death occurring after provocation was the result of passion, and that it is also proper to be considered where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions. That eminent jurist expresses himself in this ever to be remembered sentence, "It must generally happen in homicides committed by drunken men, that the condition of the prisoner would explain or give character to some of his language, or some part of his conduct, and, therefore, I am of opinion that it would never be correct to exclude the proof altogether." (*Id.* 19, 20.) *Kenny* v. *The People* (31 *id.* 330) affirms and reapplies the doctrine of the *People* v. *Rogers.* The prisoner there was allowed to show his drunkenness or intoxication at the time of the offense. (*Id.* 335.) How potent would the fact of intoxication have been before the jury, in showing the state of mind of the prisoner in the conversation with officer Mee at the time of his arrest, or in explaining his statements at the station-house, as testified to by Sergeant McConnell and Captain Allaire, or the still more fearful statements put in his mouth by that *happy*

witness, officer Lambrecht. What he said on those occasions would have been seen by the jury, through the medium of that fact, to be mere idle, unmeaning bluster, not emanating from the heart, and disentitled to any weight whatever.

X. The court, at the trial, erred in excluding the offer of the prisoner's counsel, on the examination of Mr. McCauley, as follows: "Judge Stuart: I also propose to show, under your honor's ruling, that Smedick bruised and beat the prisoner to the peril of his life on several occasions prior to the killing, and that he also made threats of violence against him, and I propose to bring the knowledge of that (these threats) to the prisoner." This point, it will be observed, is stronger than point VI, because the exception embraces an offer to show threats of violence, on the part of the deceased, against the prisoner, and that those threats were communicated to the prisoner. This knowledge must have, more or less, influenced the feelings and conduct of the prisoner in meeting the deceased, and particularly if the deceased attempted any violence upon him.

XI. The court, at the trial, erred in allowing the questions, on cross-examination, to Henry Real, as to what he had been arrested for, whether he had ever been in the penitentiary, and how long he had been there. It was in direct conflict with *Newcomb* v. *Griswold*, (24 *N. Y. Rep.* 298.) It is true the court told the witness that he need not answer if he did not want to, but the decision cited says that "if the question ought not to be asked, the objection cannot be referred to the privilege of the witness."

XII. The court, at the trial, erred in refusing to charge the jury that if the proof failed to show which wound it was that actually killed, the case was not made out according to the indictment. The evidence of Dr. Beach showed that there were two wounds upon the body of the deceased, and but two; so that the story of three shots having been

seen fired at and into the deceased is not true, if this circumstance, which cannot but be true, is relied upon. The statement that officer Lambrecht put into the prisoner's mouth, "I put three balls in him," is not sustained by this circumstance either. One thing is certain, if the prisoner was as close to the deceased as he was testified to have been, and was perfectly sane, he ought to have known how many balls entered the deceased. One of the wounds was where a ball entered just about in front of the ear, passing directly through the head, and emerging at the other side just opposite the ear. The other was where a ball entered a little to the right of the breast bone, and then "went directly through backwards." Either was sufficient to have produced death. The hemorrhage from either was sufficient to have caused it. The testimony could not show which wound was inflicted first, nor which wound was the immediate cause of death. The indictment contained but one count, founded upon death from the wound in the head. If the deceased did not die from that cause, the prisoner could not be convicted, under the indictment. In *The People* v. *Tannan*, (4 *Park. Cr. Rep.* 514,) where the prisoner was indicted for killing the deceased by beating and striking him, and it appeared that he and the deceased had had a regular fight by appointment, resulting in the death of the deceased, Ingraham, J., before whom the prisoner was tried, instructed the jury that if the deceased came to his death from injuries received by falling on a mound of earth, and not by the beating and striking, they should acquit him, under the indictment. In one of the rounds in the fight, the evidence showed that the deceased was violently thrown upon a mound of earth, and that the injury therefrom could have produced death. That is *quatuor pedibus* with this case. The rule in reference to proving the mode of death laid in the indictment is this: If the act of the prisoner and the means of death proved agree in substance with those alleged, the

nature of the violence and the kind of death occasioned by it being the same, a mere variance as to the nature or kind of instrument used will not be material. (3 *Chitty's Cr. Law*, 734, 735, 736, *m. p.*) The present indictment should have contained two counts; one, framed upon the wound in the head; the other, upon the wound in the body. If the evidence in this case did not show, beyond all peradventure, that the deceased died from the injury in the head, the prisoner could not be convicted under the indictment. Until our courts hold that an indictment need not set out the injury that caused death and dispense with one of its fundamental attributes, the present exception must be sustained. It would hardly be in place, in asking, as we do, that the prisoner have another chance for his life, to say

Una spectanda justitia, nihil præterea,

to those who occupy "*judicii locum*," the judgment seat. The responsibility, however, is upon the court of approving the law which conduced to the verdict of the jury. While technicalities should not serve unduly to screen those who have forfeited their lives and liberty for the good of the community, it should be remembered that the judicial action of to-day becomes a precedent for that of to-morrow, and that judicial certainty, consistency and stability, are absolutely indispensable to the safety, and needed for the protection, of innocence and virtue.

S. B. Garvin, for the defendants in error.

By the Court, CLERKE, P. J. I. The first point taken by the counsel of the plaintiff in error involves the question of jurisdiction. It appears from the judgment record that the indictment was presented in the court of general sessions on the first Monday of August, 1868; that on the 6th day of the same month the said court ordered that the indictment be sent to the next court of oyer and term-

iner to be held in and for the city and county of New York, there to be determined according to law; that on the 1st day of February, 1869, the indictment was accordingly sent to, and received by, the court of oyer and terminer, to be determined according to law; and afterwards, on the 10th of February, in the same year, at the said court, before a jury for the purpose impanneled and returned, the plaintiff in error was convicted of murder in the first degree, as in the indictment was alleged against him.

The counsel for the plaintiff in error states, in his 1st point, that it is not alleged that the session of the court, where the prisoner was tried, was the court next after the 6th of August, 1868, when the transferring of it to the court of oyer and terminer was made; and he says that it was conceded on the trial that the next court of oyer and terminer sat in October, 1868. On referring to the error-book, I cannot find any such concession. No doubt Mr. Stuart, counsel for the prisoner, in stating his objection to the jurisdiction of the court, affirms that a court of oyer and terminer had been held in the previous October; and he is not contradicted, either by the court or the opposing counsel. We, however, can alone be guided by the record; and from all that there appears, we cannot infer that a court of oyer and terminer was held in October, 1868; but, on the contrary, it is to be inferred that the court next after the 6th of August was held in February, 1869, when the prisoner was tried. But if a court had been held in October, I do not think it was indispensable that he should have been then tried. Undoubtedly the statute (3 *R. S.* 303, *5th ed.*) directs, in the 6th section, that the courts of sessions shall send all indictments, not triable therein, to the next court of oyer and terminer, there to be determined according to law; and in the 7th section, the one applicable to the case before us, it says that the said courts may, also, by an order to be

entered in their minutes, send all indictments for offenses triable before them, which shall not have been heard and determined, to the next court of oyer and terminer, to be there determined according to law. Does this necessarily require that the prisoner shall be tried during the next session of the court, and, if not then tried, that he shall not be tried at all? It appears to me that the language of the statute does not, peremptorily, require that the trial shall take place at any particular term or session. It shall, indeed, be sent to the court held next after the time when the order of transferrence had been made; but when it says *there* to be determined according to law, it does not mean *then*, at that particular term or session. It still, as on all occasions, leaves the control of the calendar with the presiding judge; and he retains the power which every judge necessarily possesses, of reserving the case, or postponing the trial, for another term or session, as the exigencies of the occasion or as justice may require. The counsel for the plaintiff in error refers us to *Quimbo Appo* v. *The People*, (20 *N. Y. Rep.* 531,) in which the judge who wrote one of the opinions in the Court of Appeals remarks, that "the court of oyer and terminer is a permanent and continuous court, existing in its appointed and stated terms." But the counsel, if he had read further, could have added the next sentence in the opinion, in which the judge says: "Its successive sessions are terms of the same, and not distinct tribunals;" and being so, being one identical continuous tribunal, it has, undoubtedly, power, like any other tribunal, to reserve or postpone a case for trial, at any one of its terms; whether it originated there or was transferred to it from any other co-ordinate or subordinate tribunal. I think this point, therefore, not well taken.

II. And the same reasoning and conclusion will apply to the 2d and 3d points; which I consider, consequently, equally untenable.

III. The counsel for the prisoner asked permission to inquire of Mee, a patrolman, and a witness called on behalf of the prosecution, what the prisoner said to him, the day after he was arrested. This was overruled, and correctly overruled. The intended question applied to language alleged to have been uttered by the prisoner, at a totally different time and place from those when and where the offense was committed, or when and where the first declarations of the prisoner were made. The language was therefore no part of the *res gestæ*. If unsworn declarations of the perpetrator of crime, after he had time to consider and concoct an excuse, were to be received as evidence, he would, in all cases, be able to manufacture an available defense for himself, if they were to be regarded at all by the jury; and if they were not to be regarded by the jury, it would be utter waste of time to receive them at all. The counsel for the plaintiff in error insisted, on the argument, that the declarations were admissible on the ground that this witness had testified, on the direct examination, that the prisoner had admitted first to him alone, on the arrest, and again at the station-house to the captain, in his presence, that he had killed Smedick; and having made these admissions, the counsel consented that the prisoner was entitled to the benefit of any further declarations made in explanation of the admissions at a subsequent period, as "some kind of counteractive for these admissions." The counsel, quoting the language of the counsel for the prisoner at the trial, as follows, "Now I ask permission that I may ask the witness what the prisoner said *next day*," insists that the meaning of this was, permission to ask the witness what reason the prisoner assigned for his act, because it was as fair from officer Mee's testimony to presume that he said it on the night and at the time of the arrest, when he admitted the act itself, as that he said it the next day. But there was no such presumption involved, expressly or impliedly, in

the terms of the proposed question. This question sought for the declarations of the next day, not for the explanation, if any, of those made on the night of the arrest. If the counsel, on the trial, wished again to ask the witness if the prisoner, at the several times when he admitted his guilt, also mentioned the reason why he committed the offense, I suppose he would have been permitted to do so; although the witness had expressly said he did not remember that the prisoner had stated any reason at the times he made the admission. Yet no doubt he would have been permitted to refresh the memory of the witness on this subject if he was able to do so. But, as I have said, the proposed question did not import anything of this kind; it was confined, in express terms, to what the prisoner had said the day next after the commission of the offense.

IV. McGill, a witness for the prisoner, was asked to state what the deceased had said to him about the prisoner, in the latter part of June or about the 1st of July, 1868. This was professedly offered "for the purpose of showing, with other facts, whether, at the time of this occurrence, the prisoner was justified by the circumstances, in apprehending danger from the officer." This presupposes that the mere apprehension of danger justifies the killing of the person from whom it is apprehended. I have no doubt that such an apprehension gives rise to many of those street shootings which occur so frequently in lawless districts; but I need scarcely say that the law has never sanctioned any such conduct, but emphatically condemns and brands it as murder in the first degree. The alleged threat of the deceased was made during the latter part of June or the beginning of July; the deceased was killed on the 23d of the latter month. The law justifies homicide only when an actual attempt has been made to murder the person committing it, or to commit any felony upon him, or upon or in any dwelling-house in

which such person is, or in the lawful defense of such person, or his or her, wife, husband, parent, child, master, mistress or servant, when, at the time of the attempt, there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and when there is imminent danger of the accomplishment of such design. But apprehension of a previous threat, followed by no *overt* act, surely does not justify homicide. Such a homicide, I repeat, the law pronounces to be murder in the first degree; while, at the same time, it affords an effectual remedy to the person against whom the threat is made, to protect him from danger, reasonably apprehended.

V. The same remarks, and the same course of reasoning, will apply to the 6th point of the counsel of the plaintiff in error. Previous bad treatment will not, any more than previous threats, justify homicide. The law affords redress for the one as it affords a remedy for the other; and in neither case is the person injured or threatened, to be his own avenger.

VI. The counsel for the prisoner, at the trial, asked the witness Rowe, "From what you saw of him that night, (the night previous to the murder,) what impression did his acts and words make upon your mind; what impression, as to the state of his mind, did his words and conduct have upon your mind?" This required the witness to state, from his observation of the whole language and demeanor of the prisoner, his opinion relative to the general soundness of his mind. The object of it, I suppose, was to show that the prisoner, at the time of the commission of the offense, was laboring under *delirium tremens.* This the court afterwards expressly told his counsel he was at liberty to show; and the witness, previously to the putting and rejection of the question, gave some evidence tending to show that the prisoner was in such a condition, on the evening preceding the murder; he said he thought

that the prisoner then had the horrors. But a non-professional person is not capable of satisfactorily answering such a question as that proposed, calling for his opinion as to the general soundness or unsoundness of the prisoner's mind. The case referred to by the counsel does not, in my opinion, sustain his proposition, (*Clapp* v. *Fullerton*, 34 *N. Y. Rep.* 190.) The judge who delivered the opinion in that case undoubtly went very far; there is no reason, however, to infer from his language that he meant to overrule the well established and only safe rule, that the opinion of a witness is, in general, not evidence. The witness must speak to facts; while on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but may also give their opinions. In the case referred to, the judge says that to render the opinion of an unprofessional witness admissible, even to the extent stated, it must be limited to his conclusions from the specific facts he discloses; and this the witness in the case before us did, by saying that he thought the prisoner had the horrors on the night previous to the homicide. His opinion as to the general soundness or unsoundness of the prisoner's mind was, I think, properly rejected.

VII. These observations apply with equal force to the counsel's 8th point.

VIII. The counsel of the prisoner, at the trial, offered to prove that the prisoner was addicted to hard drinking; that he sometimes drank to great excess, and continued on drunken sprees for days and weeks at a time, and had had delirium and insanity. The court asked whether the counsel proposed to show that within two or three days previous to the homicide he had one of those fits on him. The counsel replied that he did not propose to show that, by the witness, but proposed to lay a foundation to prove it. The court ruled out the question, and, afterwards, told the counsel that if he could show that the prisoner had

delirium tremens, at or about the time of the homicide, he could show it by this or any other witness. The counsel remarked that he proposed to show the drinking first. The course prescribed by the court renders the objection untenable.

IX. The observations and reasoning which I have stated in relation to counsel's 5th and 6th points, apply to the 10th point. Whether the alleged threats were or were not communicated to the prisoner, the homicide was not justifiable.

X. Henry Real, a witness called on behalf of the prisoner, was asked, on the cross-examination, by the counsel for the people, whether he had ever been arrested in New York; he said he had. He was then asked whether he remembered what it was for; this was objected to, by the counsel for the prisoner; and it was not answered. He was then asked if he had ever been in the penitentiary. This was also objected to by the counsel for the prisoner. The court remarked to the witness that he need not answer if he did not think proper to do so. There seems to have been no exception by the counsel of the prisoner to the admission of the question by the court; and the witness proceeded to answer, saying, "I will tell the truth; I was in the penitentiary." Then the counsel for the people asked him, "How long there?" The question was objected to by the prisoner's counsel; the objection was overruled; and then the counsel duly excepted. The only question which we are called upon to consider, no exception to the rulings of the court having been taken, is as to the leading question put to the witness in relation to his imprisonment in the penitentiary. There is no point appertaining to the rules of evidence on which greater diversity of opinion exists than upon questions calling for answers having a tendency to degrade the character of a witness. I think, however, now, that the conflicting authorities on

this subject may be deemed reconciled. Where, as in *Newcomb* v. *Griswold*, (24 *N. Y. Rep.* 298,) the witness was asked, on the cross-examination, whether he had been convicted of petit larceny, although the opposite party, alone, and not the witness, objected, it was held that the party has a right to insist that the conviction be proved by the record; because this is the only proper way of proving a conviction. But where, as in the *Great Western Turnpike Co.* v. *Loomis*, (32 *N. Y. Rep.* 127,) the question called for an answer calculated to disparage the witness, and not directly to prove a conviction, it was held that such questions should be allowed or disallowed by the court in the exercise of its discretion; and that the ruling is not subject to review, unless in cases of manifest abuse or injustice. In the case before us, the witness having answered that he had been in the penitentiary, although the court informed him that he was not bound to answer, and the counsel for the prisoner having taken no exception, was then asked, "How long there?" This was not calling for proof of his conviction, nor did it involve the question of his conviction, which could be proved only by the judgment record; although his being in the penitentiary presupposes a conviction. But, having admitted, without due exception on the part of the prisoner's counsel, that he had been there, an answer showing the duration of the time of his imprisonment was, if it was capable of producing any effect, calculated merely to disparage him. The answer which was in fact given, if believed at all by the jury, must have been favorable rather than prejudicial to him. He answered, "four months;" and he added, "innocent of the crime."

XI. The counsel for the plaintiff in error, in his 12th point, maintains that the court erred, at the trial, in refusing to charge the jury, as requested by the prisoner's counsel, that if the proof failed to show which wound it

was that actually killed the deceased, the case was not made out according to the indictment. The indictment charged, in substance, that the prisoner made an assault, and with a pistol charged and loaded with gunpowder and a leaden bullet, fired at the deceased, and then and there feloniously, and of his malice aforethought, did strike, penetrate and wound the deceased with the leaden bullet; causing a mortal wound of which he died. This the prosecutor was bound to prove; but it mattered not which of the bullets, and which of the wounds, caused the death of the deceased. Whichever bullet caused his death, it was fired off by the prisoner, out of a pistol held and discharged by him, and inflicted a wound, which caused the death of the deceased. This 12th point, therefore, like all the others, I hold to be untenable.

I have thus patiently and carefully considered all the numerous points, with the introduction and voluminous comments of the counsel of the plaintiff in error. I have a conviction that the conclusions at which I have arrived, in relation to these points, are incontrovertible. But I am convinced if I have erred, and if any of the rulings of the court, at the trial, were erroneous, that the error did not affect the substantial rights of the prisoner. If the rulings were the other way, it is not within the range of legal possibility that the result could have been different. The perpetration of the frightful act itself, the deliberation with which it was executed, the cruel vindictiveness which instigated and accompanied it, the absence of mental alienation, except what was caused by the tumult of malign passions, were so satisfactorily proved, that whatever disposition the court made at the trial, of the various objections and requests of the prisoner's counsel, the jury could not, without a grave dereliction of duty, have rendered any other verdict than that which they did render. The doctrine that the court shall disregard any error or defect in the pleadings or proceedings which has not affected the

substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect, is salutary and just, equally in criminal as in civil cases. It will make the administration of justice easy and efficient, the triumph of mere technicality almost impossible, and the impunity of criminals, it may be reasonably hoped, of rare occurrence.

The judgment of the oyer and terminer should be affirmed.

[NEW YORK GENERAL TERM, June 7, 1869. *Clerke, Geo. G. Barnard* and *Cardozo*, Justices.]

JESSE N. BOLLES, receiver &c., *vs.* JOHN A. DUFF and others.

The act of April 25, 1867, by which section 268 of the Code of Procedure is so amended as substantially and in effect to allow an appeal, before final judgment, directly to the general term, from an interlocutory decision or judgment directing an accounting, or further proceedings, before final judgment, cannot have, or be regarded as having a *quasi ex post facto* operation, so as to give the right to make the motion for a new trial allowed by such act, in a case where the interlocutory decision or judgment was made prior to the passage of that act.

In such cases, the interlocutory decision or judgment can be reviewed only in the manner prescribed and allowed by the law existing when such decision or judgment was made.

It is no answer, in such a case, to say that the attorney for the plaintiff submitted the papers to the general term, without taking the objection. His consent cannot give the general term the power or right to review the interlocutory decision in a way not allowed by the law in force when the decision was made.

Without reference to the question of *power* or jurisdiction to examine and decide a motion for a new trial, on the merits, before final judgment, the practice was well settled, prior to the amendment of 1867, that, irrespective of the consent or wishes of counsel, the general term would not hear an appeal from an interlocutory decision or judgment providing for an accounting &c. before final judgment; that the court would protect itself from being placed in a position of liability to be compelled to hear an appeal from an interlocutory judgment, and a final judgment, both, in the same action.

MOTION by the defendant Duff for a new trial, under section 268 of the Code of Procedure, as amended by the act of April 25, 1867. (*Laws of* 1867, *ch.* 781, § 9.)

By the Court, SUTHERLAND, J. When this case was called at the last April general term, upon the plaintiff's appearing and answering by his attorney or counsel, Mr. Thayer, and upon no one appearing or answering for the defendant Duff, and upon Mr. Thayer's expression of a disinclination to take the defendant Duff's default, and asking the court to permit him to submit his printed points with copies of the case and other papers, with permission for the attorneys or counsel of the defendant Duff also to submit printed points with such other papers as they might wish to submit, the court permitted Mr. Thayer to do so, and directed him to give notice to the attorneys or counsel of the defendant Duff of such submission and permission. Soon after, we were furnished with proof that written notice of such submission and permission had been given, a day or two after such submission, to the defendant Duff, to his attorneys and to Mr. Graham as his counsel.

So far as I am informed, no points or other papers in this case were submitted or handed up for or in behalf of the defendant Duff, before the adjournment of the general term; nor, so far as I am informed, has or have the defendant Duff, his attorneys or counsel, ever in any way availed himself or themselves of the permission or privilege thus given by the court, of which it seems they had notice.

If the views presently to be expressed as to our proper disposition of this case are correct, and should be concurred in by my associates, as it is to be presumed if any points had been submitted for the defendant Duff, that, like those of the plaintiff's counsel, they would have been on the merits, and confined to merits, it is gratifying to see that the defendant Duff cannot possibly suffer from this seeming disregard of the courtesy of the court.

When looking into the papers submitted, it appears that this is a motion for a new trial by the defendant Duff, under section 268 of the Code, *as amended by the act of April* 25, 1867.

By this act the first paragraph of section 268 was amended, so as to allow and provide for a motion for a new trial at general term on a case or exceptions, where the decision of the court, filed under section 267, does not authorize final judgment, but directs further proceedings before a referee or otherwise; that is, by the act of 1867 section 268 was so amended as substantially and in effect to allow an appeal, before final judgment, directly to the general term, from an interlocutory decision or judgment directing an accounting or further proceedings before final judgment.

It further appears from the papers submitted that this action was tried before Judge POTTER at special term, and that an interlocutory decision or decree was made by him, in it, on the 29th day of June, 1866, by which the defendant Duff was decided and declared to be a mortgagee and trustee in possession of certain property, and liable to account, &c., and by which a reference was made to a referee named, to take and state the account upon certain principles stated, and by which the question of costs, and all questions except those settled by the interlocutory decision, were reserved until the coming in of the referee's report.

It does not appear that the referee has ever reported, or that there has yet been any final judgment in the action, and the presumption is that the accounting is now going on before the referee named, or some other referee.

Now it is not necessary to cite cases to show that before this amendment of section 268, in April, 1867, no such motion as this was provided by law, or could be made; that there was no practice, provision of the Code or prin-

ciple of law allowing it. I think it may be said that our authority to decide this motion on the merits must rest solely on this amendment.

The question is, then, whether this amendment in April, 1867, can have, or should be regarded as having, a *quasi ex post facto* operation, and gives the right to make the motion for new trial allowed by the amendment, when, as in this case, the interlocutory decision or judgment was made, nearly a year before the amendment.

Upon general principles it would seem that the amendment ought not to be regarded as affecting the right of parties attached, and as they had attached or were fixed, prior to the amendment.

It would seem to be clear from *The People* v. *Carnol*, (6 *N. Y. Rep.* 463,) and *Ely* v. *Holton*, and *Humphrey* v. *Parsons*, considered and decided together, (15 *id.* 595,) that the interlocutory decision or judgment in this case can be reviewed only in the manner prescribed and allowed by the law as it was when the interlocutory decision or judgment was made.

It is no answer to say that the attorney for the plaintiff submitted the papers without taking the objection. This consent cannot give the general term the power or right to review the interlocutory decision in a way not allowed by law when the decision was made. I think it is a question of power—of jurisdiction, to review the interlocutory decision, in the way it is sought to be reviewed by this motion.

Beebe v. *Griffing* (6 *N. Y. Rep.* 465) was submitted on printed arguments, and no objection was taken to the appeal by the respondent, but the court dismissed the appeal, holding that they had no authority to review the intermediate order in that stage of the case.

But, in my opinion, it is not necessary to say, in this case, that we have not power or jurisdiction to examine and decide this motion on the merits.

The practice was perfectly settled, by repeated decisions, before the amendment referred to, that the general term would not, irrespective of the consent or wishes of counsel, hear an appeal from an interlocutory decision or judgment providing for an accounting or other further proceedings before final judgment; that the court would protect itself from being placed in a position of liability to be compelled to hear an appeal from an interlocutory judgment and a final judgment, *both*, in the same action.

I have omitted to state that it appears from the papers submitted, that the plaintiff, and the defendant Duff, both noticed the motion for argument on the case and exceptions at the April general term.

The motion should be denied, and the case and exceptions be dismissed, without costs to either party, on the ground that the amendment which has been referred to does not apply to the case, nor authorize this motion; without considering whether the interlocutory decision or decree in the case was or was not erroneous—a question which I have not at all looked into.

[New York General Term, June 7, 1869. *Clerke, Ingraham* and *Sutherland*, Justices.]

WELLS *vs.* CONE and others.

In an action to recover damages for an injury to the plaintiff's boat, occasioned by a collision, a witness who is a practical boat builder and has recently examined the injured boat, and made an estimate of the cost of repairing it, may be allowed to state what, in his opinion, is the difference in value of the boat at the time of testifying, and as it was before the collision.

Such a case is analogous to an action to recover for an unsoundness or defect in an article which has been warranted to be sound and perfect.

A judgment will not be set aside, even on a bill of exceptions, for an erroneous admission of testimony, when the court can see, clearly, that it has occasioned no injury to the objecting party.

The return of a justice of the peace, on appeal from his judgment, is not to be treated as a bill of exceptions. It partakes more of the nature of a case to set aside a verdict or a report of referees. And in such cases, the whole case is to be examined, and if the court can see that substantial justice has been done, notwithstanding the alleged error, it will not interfere.

Where, in an action for a tortious injury to personal property owned by partners, one of the owners is not joined as a plaintiff, and the defendant omits to avail himself of the nonjoinder, by demurrer or answer, he will be deemed to have waived the objection, and cannot avail himself of it as a ground of nonsuit.

APPEAL from a judgment of the Herkimer county court.

The plaintiff sued the defendants in a justice's court, and complained that they negligently injured his canal boat by running their boat against it. The defendants, in their answer, denied the allegations of the complaint, and also alleged that the injury, if any, occurred by the negligence of the plaintiff. The cause was tried before a jury. It appeared that the plaintiff and one Van Buren, each owned one half of the injured boat. That they were copartners, and that the plaintiff was in the possession of the boat, and had the charge of the business at the time of the injury. That the boat of the plaintiff was lying moored snugly to the heel-path side of the Erie canal, in the city of Utica, near the city mills, for the purpose of unloading; where the canal was wide enough to permit three boats to pass abreast, but not wide enough for four to do so; and

which the acting canal superintendent, on that section, had assigned as a proper place for that purpose; the bow of the boat being headed to the east. That a raft of about six cribs of timber, on the canal and going east, was passing the boat of the plaintiff, the front crib being about opposite thereto. A Rochester boat was also navigating the canal, going from the east to the west, and passed between the boat of the plaintiff and the raft, its bow having got from twenty to thirty feet west of the stern of the plaintiff's boat. While the raft, the Rochester boat and the boat of the plaintiff were in the positions described, the defendants, who were navigating their boat, and coming towards the east, had passed the rear portion of the raft on the heel-path side of it, and struck the bow of the Rochester boat, on the heel-path side, with the left side of the bow of the defendants' boat, by which collision the bow of the defendants' boat was thrown to the right, and it struck the stern of the plaintiff's boat, and produced the injury complained of. The occurrence took place at about noon.

The plaintiff proved, by one John D. Schwab, that he was a boat builder, residing at Utica, and had worked at the business some eight or nine years, and knew what it would cost to repair boats, and that he generally made out the bills for repairs, at the dock at which he worked. That he had examined the boat in question that morning. He then stated in detail each injury which the boat had received by the collision, and gave a bill of items of the cost of repairing the injury, including only the dockage, material and labor to do the work, and which items amounted to the sum of $22.50, without including any charge for the detention or delay while the repairs were being done. And he also testified that when so repaired he did not think it would be as good, and not so stiff in the stems, as it was before. The justice then asked the witness, "What, in your opinion, is the difference in the

value of the boat now, and as she was before this collision?" To which the defendants objected, on the ground, 1st. That it was improper and irrelevant; 2d. It is not the way to prove damages; 3d. Witness had no knowledge of the boat before the collision; 4th. It calls for an opinion; and 5th. Takes the question of damages from the jury. The justice overruled the objection, and the defendant excepted; and the witness answered, "Should think the difference from $20 to $25."

When the plaintiff rested, the defendant moved for a nonsuit, "on the ground that Van Buren was the joint owner of the boat injured by the collision, and partner of the plaintiff in running her, and was not joined as a party plaintiff." The court denied the motion, and the defendant excepted. The defendant Albert Cone testified that he was driving the team of his boat at the time of the collision, and had the usual side to pass a raft; that he commenced passing the raft, at or near the weigh-lock, then some distance from the plaintiff; that they were some time passing the raft; that his line catched a number of times. The boat coming up (Rochester boat) was not in sight at the time he commenced passing the raft; that he discovered the plaintiff's boat and the Rochester boat about the same time; that when he got down near the plaintiff's boat the team of the Rochester boat was stopped, and that the defendants' team kept towing along. That about the time the team of the Rochester boat started up, and dropped in near, there was room enough for one boat to pass, but not for two. That the defendant then stopped his team, and that when his team stopped, his boat was about one hundred feet from the boat of the plaintiff. That his boat collided with the Rochester boat, and was thrown against the boat of the plaintiff. His testimony was in part corroborated by the testimony of Albert Cone, Jr.; and Francis Cone was also sworn, but

his testimony was confined to what took place at the moment of the collision.

The jury found a verdict for the plaintiff of $20, for which sum, with costs, the justice rendered judgment. The defendant appealed to the county court, where a judgment of reversal was rendered, upon the ground that there was no proof of negligence on the part of the defendant. And from that judgment the plaintiff appealed to this court.

Thomas Richardson, for the appellant.

Ely T. Marsh, for the respondent.

By the Court, FOSTER, J. I think there was no error in permitting the witness Schwab to state, "What, in his opinion, was the difference in value of the boat *then*, and as she was before the collision." He did not give an opinion founded upon the testimony of others; but from the condition of the boat, as he saw it before the injury, while unloading, and as he saw it after the injury. He had all the science in regard to the building and value of boats necessary to render him competent to testify as to the value, and he had made an estimate of the cost of repairing it. It has no analogy, in my opinion, with any of the cases where the courts have held that an opinion cannot be given; but is analogous to the case where an action is brought to recover for an unsoundness, or defect in an article which has been warranted to be sound or perfect. And in such case it is undoubtedly correct to ask the witness the difference in value between the article, if it had been as warranted to be, and as it in fact was. (*Nickley* v. *Thomas*, 22 *Barb.* 655. *Brill* v. *Flagler*, 23 *Wend.* 354. *Casey* v. *Greeman*, 4 *Hill*, 625. *Joy* v. *Hopkins*, 5 *Denio*, 84.) Besides, the answer of the witness could not possibly injure the defendants. He had given items of expense

necessary to the repair of the boat, amounting to more than the verdict, exclusive of the loss of time and expense of waiting for the repairs to be made; and that testimony was undisputed. And it is a well settled rule that a judgment will not be set aside, even on a bill of exceptions, for testimony erroneously admitted, when the court can see clearly that it has occasioned no injury to the objecting party. (*Bort* v. *Smith*, 5 *Barb.* 283, 285. *Crary* v. *Sprague*, 12 *Wend.* 41. *Benjamin* v. *Smith*, *Id.* 404.)

And it is quite clear that the return of the justice is not to be treated as a bill of exceptions. It partakes more of the nature of a case to set aside a verdict or report of referees. And, in such cases, the whole case is to be examined, and if the court can see that substantial justice has been done, notwithstanding the alleged error, it will not interfere. (*Bort* v. *Smith*, 5 *Barb.* 285. *Spencer* v. *Saratoga and W. Railroad Co.*, 12 *id.* 383.)

There was no error in the refusal to nonsuit the plaintiff. The defendant may demur when it appears on the face of the complaint that there is a defect of parties. (*Code*, § 144.) When it does not appear upon the face of the complaint, the objection may be taken by answer. (*Id.* § 147.) And if the objection be not taken by demurrer or answer, the defendant shall be deemed to have waived the same. (*Id.* § 148.) And where, in an action for a tortious injury to personal estate owned by joint tenants, one of the joint owners is not a party plaintiff, and the defendant omits to avail himself of the nonjoinder, in pleading, he will not be allowed on the trial to prove the interest of the owner, not joined in diminution of the amount to be recovered. (*Zabriskie* v. *Smith*, 3 *Kern.* 322.) And the rule must be the same in the case of copartners.

The remaining question is whether the evidence was sufficient to support the verdict. The plaintiff was without fault; his boat was close to the heel-path, for the purpose of unloading, where the canal was wide enough for three

boats to lie abreast, and at the place assigned by the superintendent for that purpose. The defendant was proceeding in the same direction with the raft, and while passing the raft saw the plaintiff's boat, and saw the Rochester boat coming from the east, while some distance from his boat; and he must have known that if his boat kept on he would meet the Rochester boat opposite to the raft, and opposite to or near the plaintiff's boat. But one of the defendants, Albert Cone, testified that he kept on and did not slacken up his team until he was within about one hundred feet of the plaintiff's boat; at which time it must have been apparent that he must come in collision with the Rochester boat, while it was opposite to the plaintiff's boat and opposite to the raft. He was negligent, then, in not stopping and thus avoiding the collision at the earliest moment when he had reason to apprehend that a collision might occur; and it is no answer to say that the Rochester boat was in fault, and contributed to the injury, for, as between them and the plaintiff, he could sue either of them who contributed to his injury. But the fault was on the part of the defendants. By slacking up when they first discovered the other boats, the raft would have gone ahead of their boat, and room would have been made for the boats to pass. And, in addition to this, the canal regulations, section 50, declare that "In all cases where two boats or floats going in opposite directions, shall approach each other in the vicinity of a raft, in such manner that they would, if both should continue their headway, meet by the side of such raft, the boat or float which shall be going in the same direction as the raft, shall stop until the boat or float going in the opposite direction shall pass such raft." Now, it is not enough that the defendants did not see the boat coming from the east when they turned out to pass the raft. It was their duty to see it, or to stop as soon as they did see it; or, at all events, they had no right to attempt to pass the raft till they could, in fact, do so, without meet-

ing the other boat opposite to it. They were legally in the wrong, therefor, and are answerable for the consequences.

The judgment of the county court should be reversed, with costs of the appellant on this appeal, and the judgment rendered by the justice affirmed.

[ONONDAGA GENERAL TERM, April 5, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

WERNER *vs.* WATERS.

Where a party upon whose property a levy is made by virtue of an execution against him, sues the sheriff for such levy, the officer, in justifying, need not produce the judgment, but only the execution; and if upon its face the execution shows that it was issued upon a judgment in a case where the court issuing it had jurisdiction, it will protect him, whether the court be one of general or limited jurisdiction; and whether, *in fact*, the court acquired jurisdiction or not; and whether the judgment was regular or not.

In such case, if the party against whom the execution issues would allege that the judgment was void, for want of jurisdiction in fact, or that it was not regular, or such as the case warranted, he must attack it directly, either by motion to the court which rendered it, or by appeal.

If the judgment rendered by a county court, on appeal from a justice's judgment, reversing such judgment and granting a new trial, is wrong, in not fixing the precise time in which the new trial shall be had, or in adjudging costs against the plaintiff, who was the respondent on such appeal, under the provision of the Code allowing the county court to fix the terms, the plaintiff cannot take advantage of it, as against the sheriff, but should seek his remedy by motion or appeal.

APPEAL from a judgment rendered by the county court of the county of Lewis.

C. D. Adams, for the plaintiff.

Mereness & Doig, for the defendant.

By the Court, FOSTER, J. The plaintiff sued the defendant, before a justice of the peace of Lewis county, and complained against him for wrongfully seizing, carrying away and selling a quantity of wood owned by the plaintiff. The defendant, who was the sheriff of Lewis county, justified by virtue of an execution delivered to him against the plaintiff, and which was issued out of the county court of said county. On the trial, it was admitted by the parties that the wood was levied upon and sold by the defendant, who was such sheriff, by virtue of an execution against the plaintiff, for the collection of a sum which, together with interest thereon, and sheriff's fees, amounted to $27.75, and that the wood sold was of that value; of which execution the following is a copy:

"The people of the State of New York, to the sheriff of the county of Lewis: Whereas Albert Clark did appeal to the county court of the county of Lewis, from a judgment rendered in a justice's court, between William Werner, plaintiff, and Albert Clark, defendant, in favor of the said plaintiff, and against the said defendant, for fifteen dollars damages, and two dollars and fifty-two cents costs; and whereas the judgment was by said appellate court in all things reversed; it was adjudged by the said appellate court that the judgment of the court below be set aside, and that a new trial of said cause be had before Z. Knox, Esq., a justice of the peace of Lowville, in said county, within six months from December 1st, 1860. It was further adjudged by said appellate court, that the respondent pay to the appellant $10 costs and the disbursements, a copy of which order having been duly served on respondent, and the said costs and disbursements having been duly taxed, and readjusted (after due notice to the respondent) by the county clerk of Lewis county, on the 10th day of December, 1860, at $21.94, and the six months in which a new trial was to be had having fully

expired; and whereas there is now actually due on said judgment of reversal, from the respondent to the appellant, the sum of twenty-one dollars and ninety-four cents, with interest thereon from the 10th day of December, 1860: you are therefore required to satisfy the said judgment out of the personal property of the plaintiff and respondent, William Werner, and return this execution, within sixty days after its receipt by you, to the clerk of the county of Lewis. Dated March 24th, 1862.

ABM. J. MERENESS,
Attorney for defendant and appellant."

Indorsed, "Levy and collect of William Werner, plaintiff and respondent, $21.94, with interest from December 10th, 1860, together with your fees, and return this execution, within sixty days after its receipt by you, to the Lewis county clerk's office.

ABM. J. MERENESS,
Atty. for deft. and appellant."

"Received March 28th, 1862. V. R. WATERS, Sheriff.
By C. M. Waters, Dep. Shff."

The justice rendered judgment in favor of the plaintiff for $27.75 damages, with costs of suit, from which the defendant appealed to the county court, where the judgment was reversed, with costs. The plaintiff appeals to this court, and the question is, whether the execution is a protection to the defendant.

Where a party upon whose property a levy is made by virtue of an execution against him, sues the sheriff for such levy, the officer in justifying need not produce the judgment, but only the execution; and if upon its face it shows that it was issued upon a judgment in a case where the court issuing it had jurisdiction, it will protect him, whether the court be one of general or limited jurisdiction; and whether, *in fact*, the court acquired jurisdiction or not; and whether the judgment was regular or not.

In such case, if the party against whom the execution issues would allege that the judgment was void, for want of jurisdiction in fact, or that it was not regular, or such as the case warranted, he must attack it directly, either by motion to the court which rendered it, or by appeal.

These principles are too familiar to need the citation of authorities in their support.

In this case the execution recites that an appeal was taken from a justice's judgment, rendered in a justice's court, to the county court, in which this plaintiff and one Clark were parties; that the county court reversed the judgment, ordered a new trial, and rendered judgment against the plaintiff for costs, to the amount for which the execution was issued.

The Code allows an appeal to the county court, from any judgment rendered by a justice's court, and section 366 authorizes the county court to give judgment affirming or reversing the judgment of the court below, in whole or in part. And in certain cases it authorizes the county court to order a new trial, at such time and place, and upon such *terms*, as the court may deem proper. And if the judgment in this case was wrong, in not fixing the precise time when the new trial should be had; or in adjudging costs against the plaintiff, who was the respondent on that appeal, under the provision allowing the county court to fix the terms, the plaintiff cannot take advantage of it as against the sheriff, but should have sought his remedy by motion or appeal, as above stated.

The judgment of the county court, reversing the judgment in the justice's court, should be affirmed, with costs to the respondent of this appeal.

[ONONDAGA GENERAL TERM, April 5, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

JAMES STORRING and others *vs.* CHARLES H. BORREN and others.

A testator, by his will, devised and bequeathed to his wife all his real and personal property, for life or widowhood, and after her death or re-marriage, he devised all his real property to his three eldest sons, F., P. and J., to be divided equally between them. To his son H. he gave his choice of choosing, *on his* (the testator's) *decease*, a guardian, and being apprenticed to a trade, and, after the expiration of his apprenticeship, to be paid $100 by F., P. and J. jointly, out of the real estate; or, if he preferred it, the testator gave him one-fourth part of his real property, after the decease or re-marriage of his mother, to share equally with F., P. and J. In an action brought by the heirs of H. to recover an undivided fourth part of the land, under the will:

Held, 1. That the true question was, did H. elect to receive the benefits to be derived from the first branch of the bequest; or did he elect to take under the devise of the real estate; not whether he afterwards so acted as to carry out the intentions of the testator in respect to the first branch.

2. That the will being explicit, and requiring the choice to be made at the decease of the testator, viz., at once, after the provisions of the bequest should become known to the legatee, he was bound to make the election at the time specified; and that infancy was no excuse for not making such election.

3. That upon the question whether or not H. elected to take the lands, the plaintiffs, claiming under him, had the affirmative; and it was not enough for them that the defendants did not prove that he did not elect to take them, but the plaintiffs must prove that he did so elect, before they could claim the benefit of his election.

4. That if H. was bound at once to make an election, and if he did make it in favor of the legacy, though he was under age, and never received the $100, he could not afterwards change the election; and the only claim he could have upon the land was his lien upon it, created by the will, for the payment of the money.

And the referee having found, as facts, that H. chose to have a guardian and learn a trade, and to be paid the $100 as provided in the will; that he never elected to take, or manifested his preference for, a share in the real estate, until after the decease of his mother; *Held* that these facts warranted the conclusions of law that H. had no right to a share of the real estate, until he made choice of it, as mentioned in the will; that he was to make that choice on the death of the testator, and could not wait till the death of his mother, and then make it; and that having chosen the first alternative, he could not afterwards choose or claim any part of the real estate, even though the $100 had never been paid.

THIS was an action of ejectment, commenced in October, 1861, to recover the undivided fourth part of one hundred (100) acres of land, lying in Deerfield, Oneida county, by the plaintiffs as the heirs at law of Henry A. Storring, their deceased father, and to which Henry A. Storring claimed title under the following clause of the will of his father, Adam Storring, which was executed on the 4th day of June, 1812, to wit:

"I give and bequeath unto my well beloved wife Nelly, all my real and personal property after my decease, during her natural life, if she remains my widow, and after her death, or after she shall marry again, I give and bequeath all my real property to my three eldest sons, namely: Frederick, Philip and John, to be divided equally between them. To my son Henry, I give him his choice of choosing, *on my decease*, a guardian, and being bound apprentice to a trade, and after the expiration of his apprenticeship, to be paid one hundred dollars by my above named sons, Frederick, Philip and John, jointly, out of my real estate; or, if he prefers it, I give and bequeath him one fourth part of my real property, after the decease or marriage of his mother, to share it equally with Frederick, Philip and John."

The complaint alleged, among other things, that Henry A. Storring did not choose and did not have a guardian, and did not learn a trade, and did not receive the $100 mentioned in the will of Adam Storring, but that he proposed to take the one-fourth of the real estate, after the death or marriage of his mother.

The answer denied most of the allegations of the complaint, and claimed that Henry A. Storring did choose a guardian, and was apprenticed to, and did learn, a trade; and denied that he preferred or chose to take one fourth of the real estate, as provided by the will. The action was referred to R. Earl, Esq., to hear and determine the issues; and on the hearing before him, the plaintiffs gave

in evidence the will of Adam Storring, bearing date June 4th, 1812, and proved that Adam Storring died seised of the premises in question, on the 6th day of June, 1812, leaving Nelly Storring his widow, and his four sons above named and several daughters, him surviving. That Henry A. Storring was his youngest son, and of about the age of 17 or 18 years when his father died. That Nelly Storring went into the possession of the premises immediately after the decease of her husband, and that she remained unmarried until the 4th day of October, 1841, when she died. That soon after her death Henry brought an action of ejectment to recover the premises. That the cause was tried in 1845, and he was nonsuited; and that he died in April, 1860, leaving the present plaintiffs his only heirs at law. The plaintiffs also introduced in evidence an agreement, under seal, bearing date the 18th day of May, 1817, between Frederick Storring and Philip Storring of one part, and John Storring of the other, by which John released and conveyed to them all his interest in the real and personal property of Adam Storring, deceased; and they agreed to pay him $300 therefor. *And the said Frederick and Philip agreed to pay a legacy of* $100, *as given by the will of the said Adam Storring, deceased, to Henry his son.* The plaintiffs also read in evidence a lease from Nelly Storring to Frederick Storring and Philip Storring, for and during her life or widowhood, of the 100 acres of land in question, at the annual rent of $50, which lease bore date the 24th of June, 1817.

John Storring, a witness called by the plaintiffs, testified that his brother Philip died in 1836. That not long before his death he told the witness he had paid Henry the legacy of $100 going to him under the will. That some time after, in a conversation with Henry about the legacy, which Philip said he had paid, Henry did not say but what it was paid—the $100—but said he had an account against Philip for work; and that the conversation

with Philip, about paying Henry, was about a year before Philip died. On being recalled by the defendant, the witness testified that soon after Adam Storring's death, Henry went to Joel Falkner's, being at the time about 17 or 18 years old. That he remembered that Henry lived at East Creek after he was married, and that he followed the milling business; and that he saw him at work at Schenck's mill, and at a grist-mill in Waggoner Hollow, some ten years after Adam Storring's death.

It was proved by Daniel Falkner that, in 1812, Henry was living in the family of Joel Falkner, in Glenn, and that he was working for Joel Falkner, who carried on carding and cloth dressing, and a grist-mill and saw-mill. That Henry worked at carding, in the season for that work, and when cloth dressing commenced he worked at that, and when that was over he worked in the grist-mill, and sometimes in the saw-mill. That he was there about five years, and while there married a daughter of Joel Falkner. That he returned there with his family once or twice, the first time in 1826–1827, and worked in the grist-mill, and occasionally on the farm. His principal business was tending grist-mill as a hired hand. Another witness testified that he knew Henry Storring long ago; that he lived at Newport, and tended a grist-mill there a while. The widow of Henry Storring testified that he tended mill at Newport, and that he tended mill at Fonda, but the time at either place was not stated.

The referee found as matter of fact, among other things, that Henry Storring, at the time of his father's death, was a minor under 18 years of age, and soon after his father's death, and during the same year, he left the home of his mother, and commenced to learn, and in the course of time did learn, the trade of a miller. That there is no direct proof that he chose a guardian, and was actually apprenticed to a trade; yet from the fact that he left his home to learn a trade, and worked for and lived with the

same person for several years, successively, and actually did learn a trade, he (the referee) inferred, as matter of fact, that he chose to have a guardian and be bound an apprentice, and to be paid the $100, as provided in the will. That he never elected to take, or manifested his preference for, a share in the real estate, as provided in the will, until after the decease of his mother, when he commenced an action to recover his interest in the land; and that there was no proof that the $100 had ever been paid him.

He also decided, as matter of law, 1. That Henry Storring had no right to the real estate, until he made choice of it, as mentioned in the will; that he was to make that choice on the decease of his father, and could not wait till the death of his mother, and then make his choice. 2. That having chosen the first alternative, he could not at any time afterwards choose, or claim, any part of the real estate; and he could not do so, even if the $100 had never been paid; for, having made his choice, he was to look for that, either to his brothers or the real estate out of which it was directed to be paid. And the referee found and decided that the plaintiffs were not entitled to recover any portion of the lands in question, and ordered the complaint to be dismissed, and that the defendants have judgment, with costs.

The plaintiff's counsel excepted, 1st. To that part of the finding of fact by which the referee found that Henry Storring left the house of his mother the same year his father died, and commenced to learn, and in the course of time did learn, the trade of a miller. 2d. To that part by which he assumed as a fact, that Henry left his home to learn a trade, and did learn one, and then inferred therefrom that he made choice to have a guardian and be bound an apprentice, and to be paid the $100, as provided in the will. 3d. To that part of the report by which the referee found, as matter of law, that Henry Storring was to make

the choice given him by the will, on the decease of his father, and could not wait until the death of his mother, and then make his choice. 4th. To so much of the report as found, as matter of law, that having chosen the first alternative, he could not afterwards choose or claim the real estate; and that he could not do so, even if the $100 were never paid; for, having made his choice, he was to look for that, either to his brothers or the real estate out of which it was directed to be paid.

Judgment was rendered on the report, dismissing the complaint, with costs to the defendants; from which judgment the plaintiffs appealed.

D. P. Corey, for the plaintiffs.

J. H. Wooster, for the defendants.

By the Court, FOSTER, J. I think the findings of the referee are supported by the evidence. The testimony shows that, in the same year that his father died, Henry Storring left home and went to Joel Falkner's, and remained with him some five years, and there learned the trade of a miller, an employment which it is proved he followed at several places, for several years thereafter. The plaintiffs introduced in evidence the agreement of the 18th of May, 1817, between his three brothers, which made provision for paying him the $100 mentioned in the will. It is true that this would not have been competent evidence coming from the other side, but they chose to introduce it themselves; and although it does not directly establish, as against Henry, that he had elected to learn the trade and take the $100, it does show that his brothers understood, as late as 1817, that he expected to receive the $100, and that they were not aware that he intended to claim the real estate. Again, there is no proof whatever, to show that he ever did, at any time

prior to his mother's death, in 1841, (some 29 years after the death of his father,) make known to any one that he intended to claim the real estate; and although after her death he commenced an action of ejectment in which, in 1845, he was nonsuited, it does not appear that he afterwards made any further claim to it, though he lived till 1860. It is not very material to the determination of the question, whether in fact he had a guardian appointed, or whether the $100 was unpaid to him. The true question is, did he elect to receive the benefits to be derived from the first branch of the bequest, or did he elect to take under the devise of the real estate; and not whether he afterwards so acted as to carry out all the intentions of the testator in respect to them.

When was his election or preference to be exercised? If the language of the clause had been indefinite as to time, he would have a right to delay making the choice until he could ascertain, clearly, which would probably be most beneficial to him, and especially as he was under age when his father died. But the will is explicit. It required the choice to be made at the decease of the testator; meaning at once, after the provisions of the bequest should become known to him. The testator could impose such terms as he pleased, as a condition of his son's receiving the legacy or bequest, or he could cut him off entirely if he chose; and when he saw fit to impose the conditions, it was for the legatee to make the election at the time required. Infancy is no excuse for not making the election. "The principle indeed is universal; it prevails in the laws of all countries, is applicable to all interests, to the interests of married women and infants." (3 *Bacon's Abr., title Election* [*E*,] 315.)

I have said that it does not appear that he gave notice in any way, that he elected to take the devise of the real estate; nor does it appear in explicit terms that he chose the legacy. But how did he act. His every act during

the five years after his father died, as far as the proof discloses it, was consistent with an election to learn the trade and take the $100. Upon the question whether or not he elected to take the lands, the plaintiffs have the affirmative. It is not enough for them that the defendants do not prove that he did not elect to take them. They must prove that he did, before they can claim the benefits of an election. Then if he was bound at once to make the election, and if he did make it in favor of the legacy, though he was under age, and never received the $100, he could not change the election; and the only claim he could have upon the land was his lien upon it, created by the will, for the payment of the money.

The judgment should be affirmed, with costs of the appeal.

[ONONDAGA GENERAL TERM, April 5, 1864. *Morgan, Bacon* and *Foster*, Justices.]

THE WAKEFIELD BANK *vs.* TRUESDELL.

55b 602
e 81 AD² 97
j 81 AD²100

Where the maker of a promissory note, when it arrives at maturity, pays to the holder the interest thereon in advance, for a definite period, and the latter receives the money and indorses it on the note as "interest" to the time specified, this, although there be no express agreement by the holder to wait for the payment of the principal till that time, will amount to an extension of time, and will discharge a guarantor; where it is evident that it was the intention and understanding of the parties that time should be given.

When there is a mutual understanding between the parties, under such circumstances, that the time of payment shall be extended, it has all the binding force of an express agreement by the holder to wait.

The cashier of a bank is the financial officer thereof, and his agreements in behalf of his principal, in all matters relating to its business of discounting and banking are binding upon it, to the same extent as if made by a resolution of the board of directors.

APPEAL by the plaintiff from a judgment entered upon the report of a referee.

On the 23d of February, 1855, the Beaver Manufactur-

ing Company, by its treasurer, made its promissory note for $2500, (without interest,) to the order of John Thompson, payable at the Wakefield Bank, at six months after date. The note was indorsed by the payee; the payment was jointly and severally guarantied by the defendant and several others, and on the 28th day of February the note was discounted by the plaintiff, for the accommodation of the maker, and the proceeds placed to the credit of Thompson, who was an agent of the company.

On the 24th of August, 1855, John Thompson paid to the cashier of the plaintiff, with the funds of the maker, the interest on the note up to the 26th day of February, 1856, which payment was made without the knowledge or assent of the defendant. The payment was made and received specifically for interest, and the cashier indorsed upon the note the words, "Int. paid to Feby. 26th, 1856," but no express agreement was made to wait for the payment of the principal till that time, or any agreement other than what is to be implied from the transaction as above stated.

The referee found, on this point, that the plaintiff, without the knowledge or assent of the defendant, did extend the time of payment upon the note for six months, and gave the maker time for its payment until the 26th day of February, 1856, and that the defendant was thereby discharged from his liability as surety, and ordered judgment for the defendant.

E. Moore, for the appellant.

Geo. F. Comstock, for the respondent.

By the Court, FOSTER, J. In the view I take of this case, it is unnecessary to present an analysis of the authorities cited by the counsel; as to which there is some real and

more seeming conflict. Those cited by the counsel for the plaintiff, holding in cases somewhat analogous to this, that the payment of interest did not extend the time of payment of the note, (*Freeman's Bank* v. *Rollins*, 13 *Maine Rep.* 307. *Crosby* v. *White*, 23 *id.* 162. *Oxford Bank* v. *Lewis*, 8 *Pick.* 458. *Blackstone Bank* v. *Hill*, 10 *id.* 129. *Agricultural Bank* v. *Bishop*, 6 *Gray*, 317. 34 *Maine Rep.* 547; *and* 4 *Hurlston & Norman*, 861.) While those cited by the counsel for the defendant hold that the receipt of interest in advance upon a note from the maker, for a definite period, if the right to sue is not expressly reserved, suspends the right of action for that time, and discharges the surety: (10 *New Hamp. Rep.* 318; 11 *id.* 335; 15 *id. id.* 110; 1 *B. Monroe*, 325; 1 *Young & Collyer*, 420–23; *Burge on Suretyship*, 206.)

The real question is, what was the intention of Thompson when he paid the interest, on the 24th of August, in behalf of the makers? and what was the intent of the cashier when he received the interest, and indorsed it on the note? and how did they understand the intentions of each other?

The cashier and Thompson both testify that there was no express agreement to wait; but can any one doubt that Thompson, when he applied to the cashier to pay the interest, desired to have the time of payment extended for six months? or that the cashier understood *that* to be his object? or that Thompson would not have paid the interest for six months, except upon the understanding that the plaintiff was to wait for that time for the payment of the principal? I am clearly of the opinion that such was his desire, and that the cashier must have so understood him. If so, he was called upon to speak, if he did not mean to assent to the known desire of Thompson. He should have declined to receive the interest at all, or have informed Thompson that he should reserve the right to collect the

note at any time. He however took the money and indorsed it *as interest* on the note; not as principal, nor generally, but as interest up to the 26th of February, 1856. And is it not clear that he intended to wait till that time for the principal; that he meant to have Thompson understand that he would so wait; and that Thompson did so understand him? It seems to me there can be no doubt that they so understood each other; and if so, it has all the binding force of an express agreement to wait. Neither of them would, upon any other supposition, have acted as they did. And the bank and makers permitted the note to run during the six months, without payment, or attempt to collect it.

But it is claimed that the cashier had no authority to receive the interest and to contract to extend the time of payment. I do not consider the question entitled to a discussion. The cashier is the financial officer of the bank, and his agreements in behalf of his principal, in all matters relating to its business of discounting and banking, are binding upon it, to the same extent as if made by a resolution of the board of directors.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, June 28, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

THE PEOPLE, defendants in error, *vs.* MOSES WHITE, JOHN O'BRIEN, WILLIAM HARTY, RICHARD HENNESSY, PATRICK SCOTT and JOHN TRANT, plaintiffs in error.

Several persons jointly indicted are not entitled to demand separate trials, where none of the acts charged amount to a felony at common law, being for a riot, and for a riotous assault and battery; where there is no allegation that the intent was felonious, or that such weapons were used as would constitute the offense a felony.

Such an offense is merely a misdemeanor, at common law, and it is not made felony by statute.

The provision of the Revised Statutes respecting assaults "with knife, dirk, dagger or other sharp, dangerous weapon," (3 *R. S. 5th ed. p.* 970, § 24,) does not reach such a case.

On an indictment for a misdemeanor only, it is entirely in the discretion of the court to determine whether several defendants shall be tried jointly or separately; and being so, the decision is final.

Where it is apparent from the tenor of the whole indictment that each count relates to the same transaction, and they are only varied for the purpose of meeting the proofs to be given, the public prosecutor is not bound to elect any one count upon which to proceed to trial.

Even in cases where it is proper for the defendant to apply for such election, the application is addressed to the discretion of the court, and the exercise of it is not reviewable on a writ of error.

In proving the guilt of the defendants, on a trial for riot, the regular and orderly way is, first to prove the combination, and then show what was done in pursuance of the unlawful design. But this is not an imperative rule; it rests in the discretion of the judge to prescribe the order of proofs, in each particular case, and, if he deems it expedient, under the special circumstances, to permit the prosecution first to prove the riotous acts, it will be only after the whole case on the part of the government has been openly stated, and the prosecution has undertaken to connect the defendants with the acts done. But it will be sufficient to fix the guilt of any defendant if it be proven that he joined himself to the others after the riot began, or encouraged them by words, signs or gestures, or otherwise took part in the proceedings.

Even though the charge, or other decision, of the court below, be erroneous, still if the court above can see clearly that it could not prejudice the rights of the party objecting to it, the verdict will not be set aside. This rule applies as well to a bill of exceptions, or writ of error, as to a case.

A charge, on a trial for riot, "that if a crowd of three or more persons engaged in the attack on H., with a preconcerted intent to commit an assault and battery upon him, and did accomplish the unlawful act, and the defendants, or any of them, participated in that unlawful proceeding, then they were

guilty of the crime of riot," is correct, within all the authorities defining what constitutes a riot.

It can be no defense to a person indicted for an assault upon a person unknown that the person assaulted becomes known, prior to, or at the time of, the trial; but it must appear that the grand jury knew such person at the time they found the indictment, and that it was found for an assault upon some other person, who was not made known to them.

In such a case, the defendants, by allowing evidence of an assault upon a particular person, without objection for variance, will be held to have assumed that he was the person unknown; where there is nothing to show that any other indictments have been found than the one then on trial.

It is not unusual to convict persons who are jointly indicted, of different grades of the offense charged; or to convict some of them and acquit others; except in cases where the conviction is of an offense to constitute which, all must have participated.

Where the jury, on an indictment for a riot and for a riotous assault and battery, find the defendants not guilty of the riot, a concert of action between them is not to be presumed, any further than the jury have found by their verdict; and each is severally liable for his individual acts.

It is no ground for a motion in arrest of judgment, in such a case, that of the six defendants, jointly indicted, three were convicted of an assault and battery, and three of an assault only.

Nor is it a ground for such a motion that the verdict on an indictment for an assault upon an *unknown* person, is void for uncertainty, and cannot be pleaded in bar of a future indictment against the defendants, or either of them, for an assault charged to have been committed upon a particular person.

THE plaintiffs in error and one John Lyons were jointly indicted at a court of sessions held in and for the county of Onondaga, for a riot and for a riotous assault and battery. The first count of the indictment charged that at an election held in an election district in the fifth ward of the city of Syracuse, on the first Tuesday of November, 1863, they, together with other persons, to the number of twenty or more, to the jurors unknown, did riotously, routously, tumultuously and unlawfully assemble, &c., and with clubs, sticks, staves, bricks and stones, and iron bars, then and there riotously, routously and tumultuously did break, pull down and destroy the engine house where said election was held, and the same did enter, and did then and there riotously, routously and

tumultuously destroy certain fixtures and furniture therein, in disobedience of the commands of the inspectors then acting as such board of election, &c., to the great terror of the people, &c., against the form of the statute, &c., and against the peace of the people, &c.

The second count was substantially in all respects like the first; and the third count charged them with riotously, routously and tumultuously assaulting with like weapons, and with riotously and routously committing, with said weapons, an assault upon a certain person *to the jurors unknown*, and with beating him so that his life was despaired of, &c. The plaintiffs in error were arraigned, and pleaded not guilty, and were tried before the said court and a jury.

At the commencement of the trial, the counsel for the defendants below "asked that the district-attorney elect which count the people shall proceed upon, on the ground that the counts so differ as not to be traversable together. The court overruled the motion, and the defendants excepted."

The defendant White asked to be tried separately, on the ground that the indictment charges a felony. The motion was denied, and he excepted. A like motion was made for each defendant, which motions were denied, and the defendants excepted.

Frank Hiscock, who was the first witness for the people, while testifying to what took place at the time in question, stated, among other things, that he saw Scott, White and Hennessy that night; and he was asked by the district-attorney, "What was said and done there?" It was objected to by the defendants' counsel, on the ground that neither of the defendants were shown to have been present. The people offered to follow it with proof that the defendants were present. Evidence admitted, and the defendants excepted. And the witness proceeded, and testified to what was said and done.

It appeared from the evidence that assaults and batteries were committed, at the time of the affray, upon Hiscock, Farnham and Mulholland; but no assault and battery was proved to have been committed by any of the accused, upon any person who, *at the time of the trial*, was unknown.

After the evidence was closed, "the counsel for the defendants asked the court to direct the district-attorney to elect which count he claimed a conviction under, from the evidence in the case, as the counts admitted of different punishment, and a general verdict might prejudice the rights of the defendants in bringing a writ of error." The court denied the motion, and the defendants excepted.

The court charged the jury, among other things, that "if they believed the evidence that the crowd there disobeyed the orders of the inspectors to keep quiet, and that they concurred in their preconcerted intent to disobey their lawful commands, and that these defendants, or any of them, were participants in that unlawful proceeding, then such person or persons are guilty of the crime of committing a riot." To which charge the defendant excepted.

The court further charged, that "if they believed that on that occasion a crowd of three or more persons engaged in the attack upon Mr. Hiscock, with the preconcerted intent to commit an assault and battery upon him, and did accomplish that unlawful act, and that these defendants, or any of them, participated in that unlawful proceeding, then such person or persons were guilty of the crime of riot." To this charge the defendants also excepted. The defendants requested the court to charge the jury that "there was no evidence in the case that would authorize a conviction of the defendants, or any of them, for riot, under the third count in the indictment." The court declined so to charge, and the defendants excepted. The defendants also requested the court to charge, "that if guilty of assault and battery, only such are guilty as

participated in the assault and battery *upon a person unknown*, as charged in the indictment; and that the defendants, or either of them, cannot be convicted of assault and battery on Hiscock, or Farnham, or Mulholland, because they are not mentioned in that count, and because other indictments found against the defendants for that *offense* have superseded the one on which the defendants are on trial." The court declined so to charge, and the defendants excepted. The jury retired, and returned into court with a verdict by which they found the defendants O'Brien, Harty and Trant guilty of assault and battery, and the defendants White, Hennessy and Scott guilty of assault; and all the defendants not guilty of the other charges contained in the indictment.

The defendants moved in arrest of judgment, for the alleged reasons, that there was no count charging the defendants with *assault and battery*, or of *assault*, which would uphold the verdict of the jury, or which could be pleaded to another indictment for the same offense, when charged as being committed on any particular person. Also that the defendants could not, on the face of the indictment, be convicted of any other offense than riot; also that a part of the defendants could not be convicted of one offense, and a part of another, as the indictment charged a joint offense; and also that the defendants should be discharged on account of variance between the indictment and the evidence. The court refused to arrest the judgment, and the defendants excepted.

The defendants were separately sentenced, Trant, Harty and O'Brien, each to be imprisoned in the county penitentiary at hard labor for one year, and each to pay a fine of $250, and to stand committed, each, until his fine was paid; and White, Hennessy and Scott, each to pay a fine of $200, and each to stand committed until his fine was paid. Each defendant separately sued out a writ of error, to bring his case into this court for review.

R. H. Gardner and *Geo. F. Comstock*, for the plaintiffs in error.

W. H. Gifford, for the people.

By the Court, FOSTER, J. I. The accused were not entitled to demand separate trials. None of the acts charged amounted to felony, at common law, being for a riot and for a riotous assault and battery, and there being no allegation that the intent was felonious, or that such weapons were used as would constitute the offense of felony. At common law the offense charged was merely a misdemeanor, as appears to be well settled by the authorities cited on the argument. It is not made felony by statute. The act referred to by the counsel for the accused (3 *R. S. 5th ed.* 970, § 24) does not reach this case. It applies to persons who shall assault, &c., "with *knife, dirk, dagger, or other sharp, dangerous weapon.*" In this indictment none of the above mentioned weapons are specifically named; nor is there any allegation that the weapons used were either *sharp or dangerous.* The offense being therefore only a misdemeanor, it was entirely in the discretion of the court to determine whether the defendants should be tried jointly or separately. (3 *R. S.* 1028, § 22.) And being so, the decision was final.

II. The district-attorney was not bound to elect any one count upon which to proceed to trial; and the court properly overruled the motion made to compel him to do so. It is apparent from the tenor of the whole indictment that each count relates to the same transaction, and they are only varied for the purpose of meeting the proofs to be given. In such case, even on a charge of felony, the court will not compel the prosecutor to elect. And in cases of misdemeanor, several counts may be included, each charging distinct and independent offenses. The defendant may be tried upon all and convicted of all or any of them, according to the proof.

(*Kane* v. *The People*, 8 *Wend.* 203.) These principles apply to such a motion, made after the testimony is closed; and even in cases where it is proper for the defendant to apply for such election, the application is addressed to the discretion of the court, and the exercise of it is not reviewable on a writ of error. (*People* v. *Baker*, 3 *Hill*, 159, *and cases cited on points.*)

III. Hiscock had testified concerning the transaction on the evening in question. He had spoken of seeing three of the defendants, and was detailing the occurrence, and the question which was put to him: "What was said and done there?" being objected to by the defendants' counsel, the district-attorney proposed to follow it up with proof that all the defendants were present. The question then was merely as to the order of proof, and was matter in the discretion of the court, and its decision final. "In proving the guilt of defendants (in case of riot) the regular and orderly way is first to prove the combination," and then show what was done in pursuance of the unlawful design; but this is not an imperative rule. It rests in the discretion of the judge to prescribe the order of proofs in each particular case, and, if he deems it expedient, under the special circumstances, to permit the prosecution first to prove the riotous acts, it will be only after the whole case on the part of the government has been openly stated, and the prosecution has undertaken to connect the defendants with the acts done. But it will be sufficient to fix the guilt of any defendant if it be proven that he joined himself to the others, after the riot began, or encouraged them by words, signs or gestures, or otherwise took part in their proceedings. (3 *Greenl. on Ev.* § 221. 1 *Hale's Pleas of the Crown*, 462, 463. 2 *Campbell*, 358, 370. 4 *Burr.* 2073.)

IV. As to the portion of the charge first excepted to, it is sufficient to say that whether correct or not, it could not have influenced the verdict rendered against the defendants for an assault and battery; and it is well settled

that even if the charge, or other decision of the court below, be erroneous, still if the court above can see clearly that it could not prejudice the rights of the party objecting to it, the verdict will not be set aside; and this rule applies as well to a bill of exceptions or writ of error, as to a case. (*People* v. *Scott*, 6 *Mich. Rep.* 289. *Hayden* v. *Palmer*, 2 *Hill*, 205. *Smith* v. *Kerr*, 1 *Barb.* 155. *Dole* v. *Lyon*, 10 *John.* 47. *Shorter* v. *People*, 2 *Comst.* 193, 202.) And the second portion of the charge excepted to, "that if a crowd of three or more persons engaged in the attack on Mr. Hiscock, with the preconcerted intent to commit an assault and battery upon him, and did accomplish the unlawful act, and the defendants, or any of them, participated in that unlawful proceeding, then they were guilty of the crime of riot," was correct, within all the authorities defining what constitutes a riot. And besides, as the verdict was for assault and battery only, and was not in any way influenced by the charge, under the rule above stated, error will not lie, even though it were erroneous. The same rule applies to the refusal to charge that there was no evidence in the cause that would authorize a conviction for riot, under the third count of the indictment. There being no conviction for a riot, the defendants suffered no injury from the refusal.

V. The request to charge, "that if guilty of assault and battery, only such are guilty as participated in the assault and battery, upon a person unknown, as charged in the indictment; and that the defendants, or either of them, could not be convicted of assault and battery on Hiscock or Farnham or Mulholland, because they are not mentioned in that count, and because other indictments found against the defendants, for that offense, had superceded the one on which the defendants were on trial," was made after proof had been given that such assaults and batteries had been committed upon Hiscock, Farnham or Mulholland. It did not appear, on the trial, that

either of them were made known to the grand jury; nor but that some or one of them were, or was, the person to the grand jury unknown, and for the assault of whom the indictment was found. It can be no defense to a person indicted for an assault upon a person unknown, that the person assaulted becomes known prior to or at the time of the trial; but it must appear that the grand jury knew such person at the time they found the indictment, and that it was found for an assault upon some other person, who was not made known to them. (*Nookes* v. *The People*, 25 *N. Y. Rep.* 380, 389, *per Davis, J.*) And the defendants, by allowing evidence of the assault on Hiscock without objection for variance, assumed that he was the person unknown. (*Beekman* v. *Bond*, 19 *Wend.* 444. *People* v. *Cook*, 4 *Seld.* 67. *Jencks* v. *Smith*, 1 *Comst.* 90.) And there was nothing to show that any other indictments had been found than the one then on trial.

Two grounds are relied upon in support of the motion in arrest of judgment; *first*, that it was irregular to convict three of the defendants of an assault and battery, and three of them of an assault only, for the reason that they were jointly indicted; and, *secondly*, that the verdict was void for uncertainty, and could not be pleaded in bar of a future indictment against the defendants, or either of them, for an assault charged to have been committed upon *any particular person*. It is not unusual to convict persons who are jointly indicted, of different grades of the offense charged, or to convict some of them and acquit others, except in cases where the conviction is of an offense, to constitute which, all must have participated. (1 *Archb. Crim. Pl.* 97. *Whart. Crim. Law*, §§ 434, 435. 2 *Burr.* 980–4. 5 *Barr*, 83.) And in this case, the jury having found the defendants not guilty of the riot, a concert of action between them is not to be presumed, any further than the jury have found by their verdict; and each is severally liable for his individual acts. And if the defendants,

or any of them, should be indicted for an assault and battery committed upon Hiscock, Farnham or Mulholland, there would be no difficulty in pleading the indictment and conviction in this case in bar; and on the trial of such issue, it would be competent for the defendants to show that on the former trial, proof of an assault upon such person was given, and that it was the assault for which the jury found their verdict; and such proof would entitle the defendants to an acquittal.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, June 28, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

LANE *vs.* WILCOX.

55b 615
78 AD 334

In an action to recover damages for fraudulently adulterating milk by adding water to it, which was afterwards mixed with the milk of the plaintiff and others, his assignors, at a cheese factory, witnesses who are farmers and dairymen, and well acquainted with the article of milk, are experts, and, as such, competent to testify whether the article delivered looked and tasted like milk and water or not.

In such an action, the rule allowing exemplary damages cannot be applied. The settled rule of damages is one of compensation, merely.

APPEAL from an order of the special term denying the defendant's motion for a new trial.

The defendant was charged with fraudulently adulterating milk, which was afterwards mixed with the milk of the plaintiff and others, at a cheese factory in Lewis county, and the plaintiff claimed as well for the damages which he sustained to his own milk, as for the damages sustained by the other persons, who had assigned their claims to him before the suit was brought.

It appeared on the trial, that in the spring of 1863 several farmers, including the plaintiff and a brother of the

defendant, made an arrangement with one Phelps, who owned a cheese factory, to manufacture their milk for that season into cheese; that an account should be kept by Phelps of the quantity of milk which each of the farmers delivered, and should manufacture it into cheese, and return to each of them such proportion of the cheese as the milk by them so delivered, respectively, bore to the whole quantitly; and they were severally to pay him one cent per pound for the manufacture of the cheese so delivered to them.

Testimony was given tending to show that on the 4th of August the brother of the defendant sold out to him his farm and dairy, and from that time until some time in September the defendant continued to deliver milk at the factory, under the arrangement above stated; and that after the 4th of August the defendant caused his milk to be watered before it was taken to the factory, and mixed with the other milk; and upon both these questions there was a conflict of evidence.

The court excluded evidence of the assignments to the plaintiff, of the claims of the other parties to the arrangement, upon the ground that they were not assignable, and held that the actual damages to be recovered by the plaintiff were limited to such as he alone had sustained.

Several exceptions were taken by the defendant to rulings of the judge, admitting evidence on the part of the plaintiff; but the only ones relied upon here are his admissions of testimony (under the defendant's objection) of dairymen and a manufacturer of cheese, that they tasted of the milk delivered by the defendant at the cheese factory, and that it tasted and looked like milk and water; to each of which rulings the defendant duly excepted.

The court charged the jury, that if they found a verdict for the plaintiff, they would find for such actual damages as he had sustained by the fraudulent mixing of the milk; "*and also such exemplary damages as the jury shall deem just*

and proper, in view of the fraud committed." To which charge in regard to exemplary damages, the defendant's counsel duly excepted. The jury found a verdict in favor of the plaintiff for $51. A motion was made before the same justice, at special term, for a new trial, on his minutes. The motion was heard and denied; and from that order the defendant appealed.

C. E. Stephens, for the appellant.

J. F. Starbuck, for the respondent.

By the Court, FOSTER, J. Only two questions arise in this case. First, whether the judge erred in admitting the testimony objected to; and second, whether he erred in charging the jury that exemplary damages could be given.

I. The evidence objected to was properly admitted. The witnesses, who were farmers and dairymen, were well acquainted with the article of milk, and showed themselves competent to judge whether it was mixed with water or not. They testified that it was much colder than the milk delivered at the same time by other farmers, and that it looked blue; and the same was the case with the witness, who was a manufacturer of cheese. I think they were all experts, and, as such, competent to testify whether it looked and tasted like milk and water or not.

II. The more important as well as difficult question is, whether the charge that the jury should also find such exemplary damages as they should deem just and proper, in view of the fraud committed, was correct or not. In actions of slander, malicious prosecution, seduction, *crim. con.*, libel, assault and battery, and false imprisonment, where malice is proved or implied from the circumstances, juries may give exemplary damages, beyond those sustained by the plaintiff, by way of punishing the defendant, and for the purpose of setting a wholesome example, and

to prevent the repetition of such offenses against the public morals and the peace and good order of society. And the rule is well founded, and salutary in its operation. With the exception of assaults and batteries and libels, they are offenses of which the criminal laws do not take cognizance. They are committed against the persons, characters and feelings of those upon whom they are perpetrated, and no accurate measure of actual damages, whether to person, character or feelings, can ever be applied in such cases.

So, too, in actions of trespass to real or personal property, where the act is such as to show that it was done maliciously, exemplary damages can and should be given. As where it consists in girdling trees, destroying buildings or fixtures, poisoning animals or destroying the other personal property of the injured party; in all such cases of malicious trespass, the rule of damages contended for by the plaintiff's counsel applies, and it is because the act is wanton and malicious.

There may be cases of fraud perpetrated under such circumstances as to imply malice, and the rule of damage in such case should be the same as in those mentioned; but no such case is cited; and none has been cited or found, which applies that rule to such a case as this.

Sedgwick (on *Damages*) lays down the rule, that "where either of these elements, *fraud*, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system, or even to the language of *compensation*, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender."

No case is referred to in support of the proposition that *fraud* in a transaction warrants the finding of punitive

damages. Such a rule would be in direct conflict with the one applicable to analogous cases, and I think that no such rule prevails.

If one knowingly or fraudulently misrepresents to his vendee the quantity or quality of a farm, or the condition or quality of personal property which he sells to him, whereby he is induced to purchase, and is injured thereby; or knowingly and fraudulently misrepresents the pecuniary standing of a third person, to one from whom such third person is desirous of obtaining property on credit, whereby the person to whom such representations are made is induced to give such credit, and is injured thereby, the well settled rule of damages is one of compensation merely, and not punitive. So also in case of trespass to personal property, under a pretended claim of right and with a view to pecuniary gain only, the rule is the same; no matter how unfounded the claim may be, provided the act be not such as to imply malice.

In this case there is nothing from which malice on the part of the defendant can be implied. The act was a gross fraud, but it cannot be inferred that it was intended to injure the other parties concerned, any further than to the extent that it benefited himself. It would hardly be claimed that if the defendant had watered his milk, and had then sold it to the plaintiff, representing it to be unadulterated, and the action had been brought for that, the rule of exemplary damages would apply. Such a rule would be in conflict with that which applies to other cases of fraud.

In my judgment, this case is analogous to the cases of frauds in the sales of real and personal property, and of fraudulent misrepresentations of the standing of third persons, above referred to; and the rule of damages should be, and is, the same. The same motives operate in this case as there, and the consequences are the same. The fraud complained of is no more wanton or malicious, and

the consequences no more injurious, either to individuals or the public, than if affected by willful falsehood.

In all such cases, while damages should not be stinted, and should be liberal to cover all the losses caused by the fraud, I think the rule allowing exemplary damages cannot be applied. A new trial should be granted, with costs to abide the event.

[ONONDAGA GENERAL TERM, October 4, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

BENSON, Sheriff &c., *vs.* BERRY and ESTES, impleaded, &c.

Although a constable having an attachment against property already levied upon by the sheriff by virtue of an execution, may levy his attachment upon such property, yet he has no right to remove it from the custody of the sheriff and of the law; and if, while he is attempting to remove such property, it is destroyed, he is liable to the sheriff, for the value.

The plaintiff in an execution cannot lose his lien acquired by a levy upon the property of his debtor, without some fault on his part.

An exception will not lie to the refusal of the judge to charge as requested, where there are no facts proved upon which the jury could legitimately find as desired.

APPEAL from a judgment rendered upon a verdict at the Onondaga circuit in January, 1864.

D. Pratt, for the plaintiff.

Geo. W. Gray, for the defendants.

By the Court, FOSTER, J. The action was brought to recover the value of a pipe of gin, which the plaintiff had levied upon, and which was subsequently taken by the defendants upon an attachment, and on the removal of which, by the defendants, the cask burst and the gin was lost.

It appeared that on the 19th of March, 1863, the plain-

tiff by his deputy, Joshua G. Osterhout, received an execution in due form for about $500, upon a judgment in favor of one Charles C. Blair, against one Robert C. Campbell, against his goods, chattels, &c., and that on the next day he levied upon the goods of Campbell, in his store, including the gin in question, and left the property so levied upon in the charge of one Ashley, who had before and until then been a clerk of Campbell; the deputy giving Ashley no instructions in regard to the disposition to be made of the property. The goods remained in the charge of Ashley until the 17th day of April, 1863, Ashley in the mean time having sold some of the goods to customers, when the defendant Berry, who was a constable, also levied upon the gin, it being still in the store of Campbell, and left it remaining there after such levy. On the same evening, at about 10 or 11 o'clock, Osterhout closed the store and took the key into his own possession; after which, and in the same night, the defendants Berry and Estes, in his aid, broke open the store and removed the gin, and in doing so it was lost, as before stated. Osterhout afterwards sold the residue of the goods remaining in the store, which he had levied on, the proceeds of which left still due on his execution from $160 to $175. There was no evidence to show that Blair, the plaintiff in the execution, had given any orders for delay; or that he had assented to any delay; or that he had given the sheriff any instructions whatever.

When the testimony was closed, the defendants' counsel moved for a nonsuit, which motion the judge denied; to which the defendants' counsel excepted.

The defendants asked the court to charge the jury, that if they believed from the testimony that the levy was made or held for the purpose of covering the property, and allowing the owner to dispose of it for his own benefit, then it was not good, as against the attachment. The court refused so to charge, and the defendants excepted.

The defendants requested the court to charge that it was proper for Berry to make the levy upon the property, and if he believed there was danger of its being disposed of, or removed, so as to defeat his attachment, he was justified in removing it, and if there was good care on his part, and it was accidentally destroyed, the plaintiff could not recover if there was such danger of removal. The court refused so to charge; to which the defendants excepted.

The defendants requested the court to charge that if the sheriff levied upon the property in such a manner and left it in the possession of the defendant in the execution, or his agent, to dispose of in such a manner, as not to apprise others of the levy, and so that the same might be disposed of and squandered, and the defendants, without notice of the levy, attached this property, the plaintiff could not recover, and the defendants, under the attachment, would be justified in removing the property. The court refused so to charge; to which the defendants excepted.

The defendants requested the court to charge that if the sheriff levied upon property enough to satisfy the execution and the attachment, and the plaintiff suffered it to be squandered by Campbell, so that he could not satisfy the execution out of the property, he could not recover. The court refused so to charge; to which the defendants excepted.

The court decided that no question should be submitted to the jury, except the question of how much there was due upon the execution. To which decision and refusal the defendants excepted.

The court further ordered the jury to bring in a verdict against the defendants Berry and Estes for the amount due on said execution; to which order and decision the defendants excepted.

The jury found a verdict against the defendants Berry

and Estes for $160, and a verdict in favor of the defendant Little.

It is true that the defendant Berry had a right to levy his attachment upon the property in question; but he had no right to remove it, for it was already in the custody of the sheriff and of the law; and if the sheriff suffered it afterwards to be squandered or misapplied, he was responsible for such neglect, as well to the plaintiff in the attachment suit as to the plaintiff in the execution, and the charge, to the proposition alluded to, was therefore correct.

Each of the other rulings and decisions of the court which were excepted to, were also correct. There were no facts to submit to the jury upon which they could legitimately find as desired by the defendants' counsel. Nothing to prove collusion between the sheriff, even, and the defendant in the execution, or from which the jury could infer it; nothing even to show that the sheriff or Osterhout were ever aware that Campbell owed any other debts than the one included in the execution; no order for delay from the plaintiff in the execution, or any interference on his part with the duties of the sheriff. The execution was not stale. It had not run half of the sixty days, when the defendants took the property. And there was not only no authority cited on the argument to sustain the propositions of the defendants, but I am not able to find any such; while the law is well settled that the plaintiff in an execution cannot lose his lien acquired by a levy upon the property of his execution debtor, without some fault on his part.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, October 4, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

APPENDIX.

BREACH OF PRIVILEGE CASES.

IN THE MATTER OF

HON. PLATT POTTER AND WINSOR B. FRENCH, ESQ.

ARRAIGNED AT THE BAR OF THE ASSEMBLY, FOR ALLEGED BREACH OF PRIVILEGE.

ON the 21st day of January, 1870, a subpœna, requiring one HENRY RAY to appear and testify as a witness in a certain criminal proceeding pending before the grand jury, at the Saratoga Oyer and Terminer, was issued under the authority of the court, the Hon. PLATT POTTER, a Justice of the Supreme Court, presiding, and was duly served on Mr. Ray, at the city of Albany. He declined to obey its mandate, on the ground of his privilege as a member of the Assembly of the State of New York. WINSOR B. FRENCH, the District-Attorney of Saratoga county, thereupon applied to the court for, and procured, an attachment against Mr. Ray for such disobedience, upon which the latter was arrested, taken before the grand jury, and required to testify on such proceeding. The arrest of Mr. Ray created some excitement in the Assembly, of which

he was a member, as it was claimed to be a flagrant violation of the privilege of that body. A committee was thereupon appointed, to investigate the matter of the arrest. Subsequently the committee made a report, in which, after setting forth the facts of the arrest, and of the examination before them of Justice Potter and others, relative thereto, they proceeded as follows:

"The question therefore arises, and the only question which your committee is called upon to consider is, whether or not Mr. Ray was exempt from arrest under the process issued in this case.

The privilege of legislative bodies is as old as the common law, from which we have gathered our liberties, and by which the rights of the people have been and are to be protected. It is older than Magna Charta, older than the writ of habeas corpus, older than the courts either of law or equity, and from the parliament of a nation and legislatures of the States have come those laws and rules of practice which are calculated to secure to the citizen all the benefits and privileges conferred by the government under which he may live. Your committee, in the examination of the question, have found that, in this country, the violations of parliamentary privilege, either of members of Congress or of members of State Legislatures, have been rare. In the earlier history of the British Parliament, when the House of Commons, for long years, struggled against the prerogative of the crown, against the overbearing aristocracy of the lords, and against the assumption of power on the part of the courts, which were for centuries the mere servants and tools of the crown, we find many instances where the Commons secured and maintained the privileges of members of that body.

In the case of *Shirley* v. *Fagg*, as far back as 1675, Mr. Fagg, a member of the House of Commons, was summoned on a process, issuing from the Court of Chancery, to appear before the bar of the House of Lords and plead

to an appeal. The House of Commons held this to be an unquestioned violation of its privilege, and passed, on the 18th of May, 1675, the following resolution:

'*Resolved*, That it is the undoubted right of this House that none of their members be summoned to attend the House of Lords during the session or privileges of the Parliament.' (8 *Grey*, 170.)

On the 20th of May, 1675, Sir Thomas Leigh, from a committee appointed by the House of Commons, gave the following, among other reasons, why a member of the Commons was not compelled to appear before the bar of the House of Lords, and this, it will be borne in mind, was when the House of Lords was sitting as a Court of Appeals of the British realm: 'The privilege of a member is the privilege of the House, and is a restraint to the proceeding of inferior courts, but not to the House itself;' thus implying that the House whose privilege has been violated is the only body possessing the right to pass upon the question whether such privilege has or has not been violated. (2 *Grey*, 399.) It is laid down as a principle in parliamentary law, in England, that the privilege of Parliament extends to all cases except three—treason, felony and breach of the peace. (4 *Inst.* 25. *Lex Parl.* 381.)

Sir William Blackstone lays down the following as the privileges of Parliament: '1st. They are at all times exempted from question elsewhere for anything said in their own House during the time of privilege. 2d. Neither a member himself, his wife or servants, for any matter of their own, may be arrested on mesne process, in any civil suit. 3d. Nor be detained under execution, though levied before the time of privilege. 4th. Nor impleaded, cited or *subpœnaed* in any court. 5th. Nor summoned as a witness or juror. 6th. Nor may their lands or goods be distrained. 7th. Nor their persons assaulted or character traduced.' (1 *Blackstone*, 163, 164.)

Mr. Thomas Jefferson, in his note upon this quotation of Blackstone, says: 'The Constitution of the United

States has only privileged senators and representatives themselves from the single act of arrest in all cases except treason, felony and breach of the peace, during their attendance at the session of their respective Houses, and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either House.'

'Under the general authority to make all laws necessary and proper for carrying into execution the powers given them, they may provide by law the details which may be necessary for giving full effect to the enjoyment of this privilege.' He goes on and says further: 'The act of arrest is void *ab initio*. (2 *Strange*, 989.) The member arrested may be discharged on motion. The arrest, being unlawful, is a trespass, for which the officer and others concerned are liable to action or indictment in the ordinary courts of justice, as in other cases of unauthorized arrest. The court before which the process is returnable is bound to act as in other cases of unauthorized proceeding, and liable also, as in other similar cases, to have its proceedings stayed or corrected.' He says further: 'This privilege from arrest, privileges of course against all process, the disobedience to which is punishable by an attachment of the person, (*the very case in point*,) as a subpœna *ad respondendum* or *testificandum* or a summons on a jury; and with reason, because a member has superior duties to perform in another place.' He goes on to say: 'When a representative is withdrawn from his seat by summons, the people whom he represents lose their voice in the debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of evil admits of no comparison.'

In December, 1795, the House of Representatives of the United States committed two persons, of the names of Randall and Whitney, for attempting to corrupt the in-

tegrity of certain members, which they considered as a contempt and breach of the privilege of the House; and the facts being proved, Whitney was detained in confinement a fortnight and Randall three weeks, and was reprimanded by the Speaker. The editor of the *Aurora*, of Philadelphia, William Duane, was, for defamatory articles, declared to be guilty of breach of the privilege of the Senate.

In the debate in the Duane case, Mr. Senator Pinckney, who opposed the proceedings, after citing the privileges of Congress, says that each House has power to enforce complete order and decorum within their own chamber; to clear the galleries if an audience is unruly, and to punish their own members; to take care that no arrests except for treason, felony or breach of the peace, shall keep their members from their duty.

There can be no doubt but that the Legislature of the State of New York has as extensive, if not more extensive, privileges than the Congress of the United States. It is the successor of the colonial legislature, which derived its privileges from the parliamentary law of England, and is not restricted in its privileges by the Constitution of the State. Mr. Pinckney, in the speech quoted above, seemed to intimate that the privileges of State Legislatures were more in their discretion than those of Congress.

The Constitution of this State, of 1777, declares that the Assembly should enjoy the same privileges, and do business in like manner as the Assembly of the colony of New York of right formerly did.

It is admitted that the Parliament of England, and the courts of law, have cognizance of contempts, and are authorized to punish for such contempts. It is also admitted that the State Legislatures have equal authority, because their powers are plenary; they represent their constituents completely, and possess all their powers, except such as their constitutions have expressly denied them; that Congress has no natural or necessary power, nor any

powers but such as are given to it by the Constitution. Therefore, the Constitution expressly and directly exempts members of Congress from personal arrest, and, therefore, with Congress no further law is necessary, the Constitution itself being the law; still, under the provision of the Constitution, which confers upon Congress the right to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them, it would be within their power to establish any regulation of law in regard to the breach of their privilege, which they might desire. It is laid down by parliamentary writers that, 'even in cases of treason, felony and breach of the peace, to which privilege does not extend, as to substance, yet in Parliament a member is privileged as to the mode of proceeding. The case is first to be laid before the House, that it may judge of the fact and of the grounds of the accusation, and how far forth the manner of the trial may concern their privilege. Otherwise it would be in the power of other branches of the government, and even of every private person, under a pretense of a charge of treason, felony and breach of the peace, to take any man from his service in the House, and so as many, one after another, as would make the House what he desired it should be.'

The rule in this country has not been carried to this extent, but the ruling is well established that, where any body desires the appearance of a member of the Legislature, or of Congress, as a witness, or in any other manner, first the permission of the House of which he is a member is asked, and then the question is before the House, whether they will or will not grant permission to the member to attend before any court or other House of Parliament. The Senate of the State of New York has no right to summon within its presence, or before any committee of that body, any member of the Assembly, without first, in due and courteous form, asking permission of the Assembly that such member may be summoned. If, then,

the Senate of the State has no such power, can it in reason be contended that a court, an inferior body, and, to a great extent, under the direction and control of the Legislature, shall have the power to subpœna, at its will, a member of either House of the Legislature, and take him from his duties as a representative of the people? Your committee are of the opinion that no such doctrine can be maintained, upon any well settled and grounded principles of parliamentary law, as applicable either to the Parliament of England, or to any legislative bodies in this country, and your committee can readily see the great danger to which such assumption of power on the part of the courts would inevitably lead.

Your committee have examined, with great care, the instances of breaches of privilege of the Congress of the United States, the first parliamentary body in this country, and they find but few instances where the privileges of either House of Congress have been violated. On the 22d of June, 1822, it seems that an assistant doorkeeper of the Senate of the United States had been subpœnaed before a committee of the House of Representatives, when Mr. Senator Holmes, from the State of Maine, offered a resolution that said assistant doorkeeper be permitted to attend as such witness. During the debate on the resolution, Mr. Foote, a Senator from Connecticut, used the following language: 'That as the officers of the Senate were not subject to be taken from their duties by the process of any court, so neither could a doorkeeper, by any process from the other House, be taken from his duties.' It was conceded that the doorkeeper was only required to attend before the committee during the recess of the Senate, and therefore the discussion ceased. This statement by Senator Foote seems to show the fact to be, that up to that time there was no question but what members of Congress, and the officers thereof, were exempt from obeying any writ of subpœna, whether issued by a court or by either House of Congress.

Your committee have found but two English cases in their researches, which would in the least question the principles they believe govern questions of this character. The one is the case reported in 1 *Salkeld*, 279, (*Dominus Rex* v. *Dominus Preston*.) There Lord Preston had been committed by the Court of Quarter Sessions for refusing to appear and testify before the grand jury in a case of high treason. He was brought before the Court of King's Bench on a writ of habeas corpus, when Lord Holt used the dictum that it was a great outrage, and had he been present at the committal he would have imposed a fine. It does not appear that Lord Preston was even a member of Parliament, or that Parliament was in session at the time; nor does it appear that he pleaded his privilege, either as member of Parliament or as a peer of the realm. And under the English rule, as your committee understands it, had Parliament not been in session, and had the time of exemption after the session of Parliament expired, then Lord Preston would not have been exempt from testifying before the grand jury in a case of high treason. The next is the case of Lord Ferrers, which occurred in 1757. An attachment issued against Lord Ferrers out of the Court of Westminster Hall for refusing to obey a writ of habeas corpus which had been issued, requiring him to produce in the Court of Westminster Hall the body of Lady Ferrers, she alleging, by prayer addressed to the chief justice, that the conduct of her husband was so harsh, tyrannical and abusive, and so endangered her peace of mind and her life, that she required to be present at the court to present her petition, and ask its protection. In that case it was a refusal to obey a writ of habeas corpus, where the party who was required to obey such writ had, as appeared to the court, been guilty of a breach of the peace, to wit: physical abuse to Lady Ferrers. Under these circumstances the House of Lords passed the following resolution: 'It is hereby ordered and declared that no peer or lord of Parliament

hath privilege against being compelled, by process of the courts of Westminster Hall, to pay obedience to a writ of habeas corpus directed to him.'

The writ of habeas corpus requires not the presence of the member himself, but the production of some person alleged to be in his custody or under his control, and therefore can be complied with without the necessity of the member being absent from his duties in the House of which he may be a member, and is very different from arrest under a process issued out of court, which actually takes the body of the member, and therefore takes him from his duties in the House to which he has been elected.

The people of the State of New York very early took into consideration this question of privilege; and the Legislature, as far back as the 20th of February, 1788, passed the following statute:

'Every member of the Legislature shall be privileged from arrest on civil process during his attendance at the session of the House to which he shall belong, except on process issued in any suit brought against him for any forfeiture, misdemeanor or breach of trust in any office or place of public trust held by him.' (*Laws of* 1788; 1*st ed. of Revised Statutes, vol.* 1, *p.* 154.)

This qualification would indicate that in all other cases the member was absolutely exempt from arrest.

The gentlemen who appeared before the committee seemed to press very strongly the idea that an attachment was not a civil process. There can be no question but what the subpœna issued in this case was a civil process, and, under the authorities above cited, void *ab initio.* Therefore your committee cannot see by what force of reasoning an attachment issued against a person for non-compliance with a summons of subpœna can be tortured into a criminal process. In other words, your committee are of the opinion that the proceedings are void from the beginning, and that no legal process can be founded upon one which was void of itself. If a member was privi-

leged from attending on the summons of a grand jury in the first place, his refusal was no contempt of the court out of which such process issued, for he had committed no offense. He had simply availed himself of a right which the statute of the State and parliamentary law gave him; and your committee is of opinion that it is a novel doctrine, dangerous in itself, that a person availing himself of the privilege granted to him by the laws and constitution of the land, becomes guilty of a crime and is liable to arrest for the exercise of the privilege thus conferred upon him. The distinguished judge himself admitted the danger to which the construction of the statute, which he seemed to desire to press upon the committee, would lead, and it needs no argument to show how dangerous it would be if such a course were allowed to be pursued. There are sixty-two counties in this State. There are sixty-two grand juries sitting, many of them during the session of the Legislature. Suppose it established that a member is liable to arrest for disobeying a summons to appear before a grand jury. How easy would it be for designing men to thus deprive the House of members to an extent sufficient to embarrass its business; or again, for designing persons to change the political complexion of the House from one party to another, by getting up fictitious charges before a grand jury and issuing subpœnas to members, and on their non-compliance, issuing attachments, and causing their arrest and transportation to the different shire towns of the counties. Your committee deem it not necessary to follow this line of argument. The mere statement of it is sufficient to show how dangerous such a rule would be.

Finally, your committee, in full view of the facts, and after a full consideration of the law and precedent governing cases of this kind, have come to the conclusion that the arrest on January 21, 1870, of the Hon. Henry Ray, a member of the Assembly from the first district of the county of Ontario, on an attachment issuing out of

the Court of Oyer and Terminer, then being held in the county of Saratoga, of which the Hon. Platt Potter was presiding justice, was a high breach of the privileges of this House by said Potter, and deserves the censure of this House. And your committee are further of the opinion, that W. B. French, in causing the issuing of such attachment, was guilty of a high breach of the privileges of this House; and that the said Windsor B. French, district-attorney as aforesaid, deserves the censure of this House. Your committee are also of the opinion, that the arrest of Henry Ray, in the city and county of Albany, by Mr. Elisha D. Benedict, a deputy sheriff of the county of Saratoga, was a high breach of the privileges of this House, and that said officer deserves the censure of this House."

On the 14th day of February, 1870, the Hon. Platt Potter had served upon him, by the Sergeant-at-Arms of the Assembly, the following notice and resolutions:

State of New York—In Assembly.
Albany, Feb. 11, 1870.

Hon. PLATT POTTER: Sir—This day the Assembly of the State of New York, passed the following resolutions:

Resolved, That the Hon. Platt Potter, Justice of the Supreme Court of the Fourth Judicial District be summoned and required to appear before the bar of this House, for a high breach of its privilege in issuing an attachment for the arrest of the Hon. Henry Ray, a member of the Assembly of the State of New York, from the first district of the county of Ontario; that the House will then take such action as the House in its judgment may see fit.

Resolved, That Hon. Platt Potter, residing in the city of Schenectady, in the State of New York, be and he is hereby ordered to attend at the bar of this House, on the 16th day of February, inst., at 12 M., at which time he will have opportunity to make explanation of his conduct in issuing the attachment for the arrest of Hon. Henry Ray, a member of this House; and this Assembly will then proceed to take further order on the subject.

By order of the Assembly,
C. W. ARMSTRONG, Clerk.

At 12 o'clock at noon of the 16th day of February, Judge Potter appeared at the bar of the Assembly chamber, when the Speaker addressed him as follows:

Mr. Platt Potter—You have been summoned to the bar of the Assembly of the State of New York, for a high breach of its privileges, in issuing the attachment under which the Hon. Henry Ray, a member of this House from the first district of Ontario county, was arrested and taken from his duties as a member of this House, and conducted to Ballston Spa, in the county of Saratoga, there to testify before a grand jury of the Court of Oyer and Terminer, of which court you were the presiding justice. What have you to say in excuse for your conduct in the premises?

Mr. Potter inquired if the presence of his counsel would be permitted. [Mr. W. A. Beach.]

Mr. Fields stated that the presence of counsel is unusual.

The Speaker declined to accede to the request.

Judge Potter: Then I will speak for myself; and proceeded as follows:

Mr. Speaker: I appear in obedience to the resolution and order of this honorable body, to give such explanations as I am permitted, in relation to what is assumed to be a high breach of privilege in causing the arrest of an honorable member of this House.

In thus appearing, sir, I do not acknowledge the power of this House—I do not acknowledge the authority of this House to call me to any account whatever; and coming here by courtesy—only out of respect to this House, I proceed to make such statements as I am permitted to make by this honorable House, without waiving the objection, which, by counsel, I am advised I might make, and decline to appear here at all by any authority that this house may have over me.

And while I stand here, thus giving all respect to this high department of the State government, I also stand here to protest against the legal right—against the legal authority of this body, to call in question my judicial acts

performed within the sphere of the judicial department of this same government, in which I have the honor to hold a place.

I claim, sir, that the judicial department of this government is entrusted with an equal portion of the sovereign power of the State; that it is possessed of equal dignity with any other; that it is a department whose powers are coördinate and coextensive with, and entirely independent of, the legislative power. That, to be sovereign and independent, when acting within its proper sphere, there must exist no other or higher tribunal to call them to account for their independent action. I protest, and claim, sir, that there is no way known to the constitution or laws of this State by which a judge can be called to account, be tried, degraded, or the dignity of the judicial office impaired, except by the only method known to the constitution, by way of impeachment for corruption in office. Of this there is no pretense here.

I am not called here, sir, as an individual, to answer for an individual offense. No, sir; this case assumes vastly greater proportions and magnitude than that. Sir, I come as a justice of the Supreme Court of New York; as one representing the judicial department of the State, to defend my *judicial* action. In speaking in their defense, common propriety demands that I should speak with all respect to this honorable body; duty to my department equally demands that I, as their representative, should speak with boldness of defense as if that whole body were here speaking to an equal. Sir, with all respect, I deny the power; I deny the legal, the constitutional power of this House to call my judicial acts in question.

I protest in the name, and as the representative, of the judicial department, against the exercise or the attempted exercise of such a power by this House. I protest in the name of the sovereign people of this State; I protest in behalf of the constitutional independence of the judicial department, against the power of this House to punish by

censure or otherwise, the individual, for acts performed while exercising the functions of a magistrate of the highest court of orignial jurisdiction of this State.

Sir, I should be a traitor to the interests, to the dignity, to the sacred character of the judicial department, to its independence, to the right to protection, if by any act of mine, or by passive submission, I should consent to the aggressive assumption of power which proposes to strike so deadly a blow at their independence; nay, if I did not with boldness, with fearlessness of consequences to myself, protest, solemnly, earnestly protest, against a proceeding so calculated, in its effect, to overawe them in the exercise of their duties, and thus to destroy their independence.

Sir, if this measure shall be carried out upon the assumed powers of this House, what is left of character or of independence to the judicial department? If one department of this government possess the power to command obedience of another of coextensive and equal power; if the legislative can usurp the authority to hold in awe, or punish the judicial, then indeed have we a despotism, and not a government of freedom. If for an official, if for a judicial act of a judge, this House possess the power to punish, even for mistaken judgment, where is the boasted protection to an independent judiciary? Where will there be found a spirit craven enough to accept a place on the judicial bench?

Sir, allow me to say that, in my opinion, it will be a sad day for this republic; a sad day for the liberties of this people, when such a doctrine shall be established.

With what offense, then, am I charged? Not with having acted corruptly; but that, as a judge, acting officially, acting in the discharge of a high and solemn duty imposed by the constitution and laws of this State, which I have sworn to support and obey, I had the independence, nay, if you please, the daring, to pronounce the law, as I understood it then, and as I understand it now; yea, more, I feel bound to say here, before this high tribunal, now,

in full view of all the terrors of its threatened power, with all the power which it may deem in its power to exert, that as I *still* understand the law of privilege in this State, were I called upon to-morrow to act again as I acted in this case, as I feel responsible to God only for its conscientious performance, I should repeat the act for which I am now called upon to explain, regardless of any action this House shall take in this matter.

My offense, then, is that in so pronouncing the law, I have differed in opinion with the honorable committee; perhaps with the whole House. A high offense, indeed! But, sir, I have committed no contempt. No contempt has been committed. As a judicial officer, in so acting I could commit no contempt for which I could be held responsible. It is not the individual who is before you, whose acts you propose to punish by censure or otherwise, that has committed any act whatever. It is a high court of this State that performed the act; yes, sir, it is a high court that has committed the sin; and the theory of this proceeding is, that the individual who at the time was clothed by the constitution and laws with the power to execute the sovereign will; he who was the mere minister of justice, acting according to his solemn sworn convictions; executing not his own, but the people's will, that is to be humiliated, threatened, overawed, for daring to do his constitutional duty.

Sir, a case like this is unheard of. It is an anomaly in this; it is an anomaly in any and every civilized government upon the earth. Yes, sir, it was reserved for this honorable House, in the year 1870, to initiate such a proceeding. It is an anomaly in every step of its progress. First, in its progress, the judge was subpœnaed to appear before an honorable committee of this House, to give evidence of the facts upon which one of its honorable members had been arrested. To this step no possible objection could be urged. None was urged. He appeared in obedience to that summons. Knowing his legal protection, little did

he imagine that he was called there to be made informer against himself for an offense; to be used as his own accuser.

A becoming respect to, and confidence in the body before whom he appeared, forbid such an idea. He was not summoned there for trial. Had he been, he would have put himself there, as he does here, upon his defense. He relied upon a reciprocal confidence, upon comity, upon the magnanimity of an honorable committee that no such object was in view as a trial. The legitimate duty of that committee, as he supposed, was, to inquire as to facts, and by what law an honorable member had been arrested; whether there had been a breach of privilege; whether the law was sufficiently protective, and if not, to recommend one that should be. He knew that he had acted in the conscientious convictions of duty, and that he was not amenable. What had he to fear at the hands of honorable men? He knew that if he had acted corruptly, then only could he be dealt with. He supposed, too, that if any doubt existed as to his rightful exercise of power, some committee, like that of the judiciary, would be selected, and who would dare to place their legal opinion, for which they would be willing to be held responsible before the legal world, upon the records of the legislative department; that before such a committee (not now intending disrespect to this) an opportunity would be given to discuss so grave a question.

But, sir, with no avowal of such an object; without a trial; I am charged by that honorable committee, that, as a judge of the Supreme Court, I have committed a high breach of privilege of this House; that as such judge I have struck a blow at the independence of this coördinate branch of the government; and the theory of your honorable committee is, that this House possess the power to punish by censure or otherwise, without a trial; not the body who committed the act; but the minister of that department, who executed its power. This is an assumption of the pre-eminence of power of this House, an assumption

of authority over the judicial department, which has no foundation in this government. It is an assumption that the legislative power, or that one branch of its body, is superior in authority to the judicial department. This is an assumption that no lawyer of any standing dare assert; and one that this House will not stultify its understanding by asserting. If this proposition as to its power is untrue, how can they exercise the power of punishment? How then is it proposed to heal this supposed deadly wound upon their dignity of privilege? They cannot punish the court; that is physically impossible. How then can they punish its minister? It is proposed, sir, to heal this wound by the *lex talionis*, the law of the right of retaliation, the right of inflicting a like injury upon a coördinate department; that is, to commit a breach of privilege in return upon the judicial deparment in satisfaction of the offense. Sir, I stand here protesting against the right to commit such a breach. I stand here claiming the privilege also of the judicial department. I assert that you have no right to bring these two departments into conflict; that you would thereby endanger the stability, the perpetuity, the independence of the government, whose trusts you have in part taken in charge.

Believe not, sir, that I say these things through any fear of consequences personal to myself. I well know that as you cannot punish the court with material or physical punishment, you cannot punish its members without a trial; that you cannot try its judges but by impeachment; that you cannot impeach but for corruption, and that in the constitutional form. True, you can resolve; you can send forth your resolve in the language of degradation, and though there may be degradation, it will not degrade him against whom it is issued. It is not such degradation that I fear; if such resolution shall be issued, it will fall harmless upon him against whom it is issued. Nay, sir, were I ambitious, I would invite it. I would court its favor. But, sir, I have no such ambition; no

ambition, but that in the sight of that God, in whom I trust, to do my judicial duty fearlessly; to the best of my ability; unawed, unterrified, uninfluenced by caprice or favor—the will of assumed rulers, or the more fearful influence of passion, of popular applause, or of popular excitement and prejudice.

But, before I proceed further upon this view of the case, I propose, candidly for a moment, to look at the law of privilege to members of the Legislature of this State, and, with all intended respect to the argument of your honorable committee, I deny, I solemnly deny, that the law of privilege of the British Parliament, as claimed by them, is the law of privilege of the State of New York, and I shall show it to be otherwise. I deny that the privilege of the Houses of Congress is the same law of privilege as that of the State of New York; and while I accord to that committee credit for much research into the law of privilege of Great Britain, I shall show that they did not search far enough to find it; and it will be seen that their report is entirely deficient in the examination of the law of privilege of this State. The law of privilege of members of Congress is not the same law as that of the British Parliament; but is secured to them in the Constitution of the United States, which limits and restricts the common law of England, as cited in that report. The laws of the several States differ from each other, and differ from that of Congress. The law of privilege of the State of New York is peculiar to itself. It is not, as is that of Congress, in the constitution, but is regulated by a statute. It is so brief in its provisions, that I shall be excused for repeating it. It is all embraced in two lines, to wit: "Every member of the Legislature shall be privileged from arrest on civil process." No lawyer of any standing or credit will deny the rule of construction to be given to this language by a maxim as old as the common law, which, applied to this case, is, "the expression of one privilege is the exclusion of every other." Members of the Legisla-

ture of this State, by this rule, are *only* privileged from arrest on *civil process.*

Would any honorable member of this house; would any free citizen of this government, like to see the legislature of this State possess the uncontrollable power of the British Parliament, as cited by your committee? Why, sir, Blackstone says "that Parliament possesses sovereign and uncontrollable authority. The whole sovereign power of the Kingdom is vested in it—legislative and judicial." The English writers say, "that with Parliament the sovereign power is despotic; it runs without limit and rises above all control." Is it the law of privilege of such a government that seems to have charmed your honorable committee? It is the privilege of the law of Great Britain, which your honorable committee claims to be in force in this State. Sir, with all due respect to that honorable committee, I deny it; and shall show it otherwise. It is the law of privilege of the State of New York, only, which this house can assert, and which is now before them for their consideration.

I shall be able to demonstrate that by that law, no breach of privilege has been committed. It is only from civil process that there is privilege.

The honorable member has not been arrested on civil process. It is impossible in the nature of things that he should have been. The process in question was issued out of the Court of Oyer and Terminer. That court is a criminal court only. It has no jurisdiction in civil cases. It cannot issue civil process. That court possesses the power, like other courts, to compel obedience to its process. All the forms of law were complied with. Disobedience to its process was proved by the proper forms of evidence. The court, composed of three persons, not of one individual, solemnly adjudged that there had been a contempt of its authority. It issued its process to arrest for this contempt. This, sir, is the high breach of privilege complained of.

Was this civil process? Without intending disrespect to any member of this body, I assert it to be little less than an absurdity so to claim. The judiciary of this State, I apprehend, would be startled at this novel assertion, that this was civil process. The elementary books of authority which influence courts in their opinions, say otherwise. They define "attachment" to be a process in the nature of a criminal proceeding, issuing out of a court of record against a person who has committed some contempt of court; enumerating, among other things, "the disregarding of its process," or "omitting to do anything that shows his disregard of the authority of the court." (*Burrill's Dictionary, title "Attachment."* 4 *Black. Com.* 284. 4 *Stephens' Com.* 19. *People* v. *Nevins*, 1 *Hill*, 154. *Bayley, J., in King* v. *Clement*, 4 *Barn. & Ald.* 231. *Jac. Law Dict. Attachment.*)

So, too, in like authority, is found the definition of criminal proceedings, as follows: "Civil proceedings are distinguished from criminal in this—the former are for a civil injury, or for a right due from one citizen to another; the latter is for a breach or violation of some public duty in which the State or community, in its aggregate capacity, are interested." In this State criminal proceedings are cases in behalf of the people. In the highest court of this State, in the case of *Spalding* v. *The People*, (7 *Hill*, 303,) the character of this process upon which the honorable member was arrested, was expressly passed upon by the court. Chief Justice Nelson, delivering the opinion, (and which case was afterwards affirmed by the Supreme Court of the United States,) said, among other things, "that *criminal contempts* was where one unlawfully interfered with the process or proceedings in an action, or by the refusal of a witness to attend or be sworn," &c. "All these," says the learned judge, "are strictly cases of criminal contempts, which have nothing to do with the collection of debts *or the enforcement of civil remedies.*" Enough, perhaps, upon this head of *civil process.* Except that I concur in the opinion

of the Court of Errors of this State; and this learned committee must excuse me, when I am compelled to say, that, as a judge, I shall in future act upon that opinion, in preference to theirs, at page 9 of their report, in which they hold the contrary rule.

They must further excuse me for differing with them in the opinion that a member of the Legislature is privileged from the service of a summons or subpœna to give evidence before a grand jury, or that the service of such subpœna or summons is void. In the recent case of Wooley and others against Benjamin F. Butler, decided in the State of Maryland, the defendant was a member of Congress; in passing through that State he was served with process, commencing a civil action against him. He applied to the court to set it aside on the ground of privilege. The court held the service of process, which did not arrest the defendant, to be good, and not void. Either that court was in error, or this honorable committee must be; and, if between such conflicting opinions, a judge should happen to be mistaken in his selection of authority, is he to be punished for contempt? But, sir, our statute has defined what are *criminal* and what are *civil* proceedings.

By the Code of Procedure *criminal* and *civil* actions are defined as follows:

"§ 2. An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress of a wrong, *or the punishment of a public offense.*

§ 3. Every other remedy is a special proceeding.

§ 4. Actions are of two kinds.

1. Civil.
2. Criminal.

§ 5. A criminal action is prosecuted by the people of the State as a party against a party charged with a public offense, for the punishment thereof.

§ 6. Every other is a civil action."

The proceeding pending in the Court of Oyer and Terminer, before the grand jury, was a "*criminal* action prosecuted by the people of the State as a party against a party charged with a public offense, for the punishment thereof."

The same definition in substance is given by Burrill, of a *civil* action. He says, "it is an action brought to recover some civil right, or to obtain redress for some wrong, *not being a crime or misdemeanor.* In this latter respect it is distinguished from a criminal action or prosecution." (*Burrill's Law Dict., Civil Action.*)

And the same author defines "civil right" to be "the right of a citizen; the right of an individual as a citizen, to sue for a right due from one citizen to another, the privation of which is a civil injury, for which redress may be sought in a *civil action.*" (*Id. tit. Civil Rights.*)

And the word "civil" is defined to be something "belonging or relating to, or affecting a person as a *citizen*, relating to or affecting the rights and duties of a *citizen*, particularly as between one citizen and another." (*Id. title "Civil."*)

From all these authorities it conclusively appears that "*civil process*" must necessarily, *ex vi termini*, include only such process as one citizen is by the law entitled to have issued by the courts to enforce or aid in enforcing some civil right in his favor against another citizen or party; and that criminal process, on the other hand, is such as issues on behalf of the people as a party, to enforce or aid in enforcing the *criminal* law against an offender and for the punishment of a public offense. Nor so far as the definition of the term "*civil process*" is concerned, are we without authority from our highest court. In *The People* v. *Campbell*, (40 *N. Y. Rep.* 137,) the Court of Appeals, MASON, J., giving the opinion, said, "It has never been questioned but such a process as this, to enforce a *civil* remedy, by the collection of a specified sum of money, is to be regarded as "*civil process.*"

But, sir, it is still alleged that the Court of Oyer and

Terminer, whose jurisdiction is *exclusively criminal*, and which has no civil jurisdiction whatever, can yet issue a *civil process*, and that the subpœna served on Mr. Ray to appear before the grand jury, was such "*civil process.*" If this was true, still the statute does not "*privilege*" him from such *service.* A member of Assembly is *only* exempted from "*arrest*" on "*civil process,*" and not from its *service*, where it may be served without an *arrest* being made. Not being *privileged* from the *service* of the subpœna, therefore, then the statute imposed the duty on him to obey its mandate.

But it is further absurdly said, that the subpœna being civil process, nothing can be built upon it, or can grow out of it, that makes the party subpœnaed liable to arrest. Sir, no *lawyer* will make such an argument. By a provision of the Revised Statutes, (vol 2, page 278, § 10,) it is provided that "Every court of record shall have power to punish, as for a *criminal contempt*, persons guilty of the following acts." Among the enumerated acts is, "that of willful disobedience of any process issued by it." And, sir, must not the court issue *criminal* process in order to punish this disobedience? This, however, is said to be a forced construction; that it is not, after all, criminal process; that under such pretense the *dignity* of this honorable body would be assailed, and its members withdrawn from the State interests; it is claimed that the true meaning of this statute of privilege is, that it must be a process that would arrest the member for a criminal charge against himself. Sir, a refusal to obey the process of the court is *criminal.* It is made so by statute. (2 *R. S.* 692.) It is an indictable offense. If, instead of the criminal process by attachment, the honorable member had been indicted by the grand jury for his disobedience, would the bench warrant issued by the district-attorney be *civil process?* and would not a *criminal bench warrant*, equally with a *criminal* attachment, have taken the honorable member from this House? The question of *policy* has nothing to

do with the law. Sir, the idea of arraigning a judge before this honorable House, for enforcing the law made by your predecessors, which you, as well as he, are bound to obey, is a new idea in the workings of our system of government never attempted till now.

But, Mr. Speaker, I have spent too much time in showing that I have acted right. So far as your power over me, or over the department of government in which I hold place is concerned, it is immaterial whether I acted right or wrong. Your honorable body have no more power over me in the one case than in the other; that is, no power at all.

Sir, your honorable committee, by their report, in which they have regarded me as an offender, but with which they did not favor me with a copy, (but for the favor of which I am indebted to the honorable representative of my own county,) have stated supposed cases of almost infinite mischief, if the privilege of members is not made as absolute as they claim. I am not here to discuss such a question. I, too, can suppose cases of monstrous public injustice, if their claimed law of privilege was the law of the land. If a case of murder or felony is committed in the presence or within the knowledge of a member of the legislature; and if, without his testimony before a grand jury or a court, the felon would escape public justice, should there be no power in this government to compel his attendance to testify? Is the dignity of a member of the legislature paramount to the public security? Do not felons and outlaws now sufficiently abound in community? Shall new devices be presented, beyond the present intricacies of law, by which their escape from punishment shall be secured? But, sir, my duty was to inquire what is the law; not what is policy.

It is my duty to say, however, in regard to the particular case before us, in justice to the case of the honorable member whose arrest is complained of here, I neither knew his name, the name of the accused, nor the crime

with which he was charged. All I now know about it is, upon the statement of the public prosecutor, that upon the testimony alone of that honorable member, before the grand jury, the accused was indicted and is now held for trial. That the accused had been perpetrating enormous frauds upon that community, claiming that he was acting as the agent of that honorable member. It appears to me, that it should have been the pleasure of that honorable member to do cheerfully, what he did of compulsion; to give the lie to the foul charge, and bring the culprit, who was assailing his fame, to justice. It is justice to him for me to say, that I do not think his refusal to appear and testify was any indisposition to have crime punished; but based solely on a mistaken opinion of his privilege as a member.

I do not further propose to discuss the question of policy presented in the report of your honorable body; nor would it become a judge to discuss with that committee the policy of a law. Judges, when acting as such, must decide what the law is; not what it should be, nor what policy dictates. If the law is wrong, it is the province of the legislature, not of the judge, to alter it. If the law is obscure, or doubtful, it is equally the duty of the legislature to declare it and make it plain. If its obscurity or uncertainty is such as to make the judiciary doubt, still *they* must act upon their best and most conscientious convictions; and if they mistake in this—if, in the view taken by this honorable House, which is but another, and only an equal department of the government—an error has been committed, is the latter clothed with power to punish for a mistake of judgment? Is this the independence of the judicial department of the government? Even if the decision of the judge happens to be upon the question of *privilege*, must he not still decide upon that question also when it comes before him? Sir, no civilized government on earth, and, above all, no free government, ever placed their judiciary in circumstances so hazardous, so despotic, as this theory proposes; subject not only to accu-

sation; but subject to have their accusers the judges; who shall try them for the offense of a mistaken opinion; and those judges, too, a body easily moved to anger by anything that looks like an indignity offered to their own order.

Mr. Speaker, I crave the privilege of a single word upon the accusation made in the report by your honorable committee. It is not of material facts omitted in their report, which would, if stated, give a more favorable view of the facts of the case, that I complain, although I might complain of that, but for the great injustice (unintentional, no doubt,) of the statement in one short paragraph of the report, not of the evidence, but of the conclusions of the committee; as follows: They say:

"His honor, Judge Potter, before the committee, in the first place attempted to extenuate or excuse his conduct by a statement that the attachment was issued inadvertently, and that his attention was not called to the fact that Mr. Ray was a member of the Assembly, although it subsequently appeared by the statements of Judge Potter, of the district-attorney, and of Mr. Waldron, the surrogate of Saratoga county, that prior to the issuing of the attachment, the fact that Mr. Ray was a member of the Assembly, was brought to the knowledge of the judge. It will thus appear that the subpœna was issued to Mr. Ray, and the attachment issued upon return of the service of said subpœna notwithstanding such knowledge."

This statement, in its effect, is not only calculated to create prejudice against me before this House, by whom it is claimed I am to be tried; but to degrade me in public estimation. *I did not attempt to extenuate or excuse my conduct; but on the contrary, justified the act then as I do now; nor was the act done by inadvertence.* That honorable committee will now do me the justice to remember, that though I did state the fact, that at the time I signed the attachment, I did not know that Mr. Ray, against whom it was moved, was a member of the Assembly; that I signed

many on that day, and this among the number; that it was not stated at the time, in my hearing, that Mr. Ray was a member of the Legislature. This I stated as facts; but I did declare to that committee that I had previously given the public prosecutor, and also to the surrogate whom he sent, the opinion that a member was not privileged; and I also declared to that committee, that had I known at the time that Mr. Ray was a member, I should have deemed it my duty, to have issued the attachment all the same. I declared it then; I declare it now to this House, and the world. Such was, indeed, my opinion. I stated the fact that I did not know of his being a representative at the time the process was issued. I stated this *as a fact*, because it was true; and because the honorable chairman called upon me first to state the facts. But, sir, I deny that I claimed to be excused, or attempted to extenuate my conduct, for that reason, further than the fact itself should have that effect. Sir, the conclusion that I attempted to excuse or extenuate, is inconsistent with avowals before that committee; that I previously advised the public prosecutor of my opinion of the law, on being asked; it is inconsistent with my avowal, that had I known the fact of membership at the time, with my opinions of duty, I should have issued it all the same. The honorable member from Oswego will remember that he replied to me, that, with my opinion of the law, he did not see how I could do otherwise. In this, sir, that honorable committee (unintentionally, no doubt,) has done me great injustice. I thrust back such a charge with indignation and contempt, as being against all my convictions. I stand here to defend myself upon the broad ground of duty conscientiously performed, admitting that I had given the opinion stated, but still repeating the fact that when I signed the process, I did not know the name of Henry Ray was that of a member.

Mr. Speaker, the fear of being tedious, compels me to omit the discussion of many points vital to the subject now

pending before this honorable body; more vital, perhaps, than a mere superficial view would suggest. A conflict between two equal departments of the same government, possessing coextensive powers, each being sovereign within its own sphere; is fraught with dangers too serious for contemplation—too serious to be disposed of under an excitement of the moment by the complaining party; who are to sit also in judgment upon their own supposed grievances. For one department, by their action, to attempt thus to reduce another to a state of servile obedience; or to destroy their independence; to bring the judiciary into a state of servile dependence upon the legislative will; would leave the former at the mercy of the latter; and the institution of an independent judiciary would perish by its own imbecility or want of power.

Permit me to say, Mr. Speaker, with all due courtesy; in all kindness of feeling; it is my deliberate conviction, that your honorable committee, unintentionally, and without the reflection that their resolutions were to involve the consideration of such a fearful precedent, would now, in view of its solemn importance, prefer either to withdraw them for further consideration—refer them to the Judiciary Committee, or to the Attorney General of the State, for a *legal*, a *responsible* opinion upon the great questions of the conflict of power which I have discussed, which are here for action under a state of excitement by those who are to act as judges, and which questions that committee have not at all considered.

Thus far, Mr. Speaker, I have argued this solemn question upon my individual views. Perhaps the argument would carry more profound respect should I cite to its support the opinions of some of the sages of the law, who, with prophetic vision did consider, and who have given opinions upon this very case.

I have thus far intended to utter no word of disrespect to this honorable body, and I shall hope to receive from them in return, that respect to my department which the

theory of our government has established as its right. In this defense I intend to utter no language of my own, equal in its severity to that of the profoundest expounders of the rights of the Judiciary under our constitutional system.

Mr. Justice Story, that distinguished jurist and expounder of the Constitution, whom all so much respect, said: "Every government must, in its essence, be unsafe and unfit for a free people, where such a department as the Judiciary does not exist with powers coextensive with those of the *legislative* department. Where there is no *judicial* department to interpret, pronounce and execute the law, to decide controversies, and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers for the purpose of commanding obedience, to the destruction of liberty. The will of those who govern will become, under such circumstances, absolute and despotic, and it is wholly immaterial whether power is vested in a single tyrant, or in *an assembly of tyrants.*" He cites the remarks of Montesquieu with approbation, "that it is found in human experience that there is no liberty, if the judiciary power be not separated from the legislative and executive;" and he adds "that it is no less true, that personal security and private property rest entirely upon the wisdom, the stability and the integrity of the courts of justice." "That government can be truly said to be despotic and intolerable, and will be rendered more oppressive and more mischievous, when the actual administration of justice is dependent upon caprice or favor, upon the will of rulers or the influence of popularity. *When power becomes right*, it is of little consequence whether decisions rest upon corruption or weakness, upon the accident of chance, or upon deliberate wrong.

In every well organized government, therefore, with reference to the security both of public rights and private rights, it is indispensable that there should be a judicial department to ascertain and decide rights, *to punish crimes*,

to administer justice, and to protect the innocent from injury and usurpation.

But perhaps this honorable body would better like an opinion still nearer home. That distinguished jurist, whose name every citizen of New York repeats with veneration, Chancellor Kent, said: "In monarchical governments the independence of the Judiciary is essential to guard the rights of the subject from injustice of the crown; but in republics, it is equally salutary in protecting the constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the objects of temporary aversion, and sometimes of popular resistance. It is requisite that courts of justice should be able at all times to present a determined countenance against all licentious acts, *and to deal impartially and truly according to law*, between suitors of every description, or whether the cause, the question or the party, be popular or unpopular. To give the courage and the firmness to do it, the judges ought to be confident of the security of their station. Nor is an independent Judiciary less useful *as a check upon the legislative power*, which is sometimes disposed, *from the force of party* or the temptations of interest, to make a sacrifice of constitutional rights."

But Judge Story was so imbued with the fear of legislative encroachments upon the judicial, that in another place he says, "that there is a great absurdity in subjecting the decisions of men selected for the knowledge of the laws, acquired by long and laborious study, to the revision of men who, for want of the same advantage, cannot but be deficient in that knowledge. *The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges, and on this account there will be great reason to apprehend all the ill consequences of defective information;* so on account of the natural propensity of such bodies *to party divisions*, there will be no less reason to fear that the pestilential breath of factions *may poison the fountains of justice.*" "These considerations," he says,

"teach us to applaud the wisdom of those States who have committed the judicial power, not to a part of the legislature, *but to distinct and independent bodies of men.*"

This may perhaps suffice upon this point. But I approach another point, which is, to ask what is the duty of a judge, even if the question of *privilege* is before him for decision? Upon this question I demand such an unprejudiced, patriotic, sensible response, that this honorable body will dare to stand upon it before an impartial constituency, and before the intelligence of the world. This is, perhaps, one of the most important points in the case. Perhaps the opinion of Chief Justice Marshall might not be inappropriate to cite on this question. Surely no intelligent lawyer, no patriotic legislator, would hesitate to look up to such a source for advice.

In looking back upon my conduct as a judge in this matter, it is a source of sincere pride, that I may call him, this profoundest of American jurists, and noble patriot, to my aid. In *Cohen* v. *Virginia*, (*reported in* 4 *Wheat.* 404,) that illustrious jurist said: "The Judiciary cannot, as the Legislature may, avoid a measure because it approaches to the confines of the Constitution. *We cannot* pass by a question because it is doubtful. With whatever doubt, with whatever difficulties, a case may be attended, *we must decide it, if it be brought before us.* We have no more right to decline the exercise of deciding, than we have to usurp a power that is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, *and conscientiously to perform our duty.*"

In another case this great judge said, "the legislative, executive and judicial powers of every well constructed government (9 *Wheaton*, 818) are coextensive with each other." If this is sound, where is the power of the one to call the other to account? In still another case, (1 *Peters*, 814,) Justice Johnson said: "In conflicts of power

and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principle and the administration of justice may require different courses; and when such cases do come, our courts *must do their duty*."

Mr. Speaker, I do not stand here to deny the power and authority of this House to punish, as for contempt, one who commits an act amounting to a breach of privilege of one of its members; but I stand here denying that as an individual I have committed any such act, or intended to commit any. The act was that of a court, of which I was but one of its ministers, and as such minister I boldly assert that I am protected by the sanctity of the position—by the fact that it was a judicial action; that my decision was one in which duty called upon me to act, and I was bound to render such a judgment in the matter as a conscientious conviction of duty demanded. It is human to err. If I have mistaken the law, it is such an error as every other judge who has ever sat upon a bench has committed; and this is the first instance in the history of American jurisprudence in which a judge has been arraigned for having mistaken the law. Yes, sir, and I may predict, *it will be the last.*

But, sir, have I even made a mistake? No court has ever adjudged it to be such. I trust none ever will. Suppose that, in the opinion of your honorable committee it is a mistake; yet my convictions are otherwise; and since the passage of your resolutions I have the voluntarily offered opinions of distinguished jurists and lawyers, more in number than compose that honorable committee, who assure me I am right. The question, then, still remains undecided, which is right, with no high judicial court to pass upon it. Suppose I am right, after all, and this honorable House shall decide that I am wrong? It will not, therefore, be wrong. No, sir; nor can any resolve that that you shall pass make it wrong. Your resolve will establish no law; and no independent judge will ever pay

it the least regard, if he deems it wrong. My opinion here may be disregarded. I cannot vote here on the question, or if I could, for aught I know, one hundred and twenty-eight, or a majority of that number, men, perhaps my superiors in legal knowledge, can outvote me. I have said this was an anomalous proceeding. It is so. My accusers, who have already adjudged that I have committed an indignity upon their high privileges, are to be my judges. Under such circumstances, I have been told, there is no hope of the act being justified. It may be so. It would be so, it is true, if only the party feeling and acting in the spirit of wounded dignity is to control—feeling that the exercise of their power is beyond control of any other power; and knowing that there is no power of appeal. But, sir, if you shall believe I am conscientious, would it not be a higher magnanimity—would it not be a better spirit of patriotism; nay, would it not be elevating, to divest the case of feeling and prejudice, and to look upon the case as a high court of law, uninfluenced by personal considerations, would look upon it? Sir, this spirit of magnanimity gives me hope, even against the spirit of supposed wounded dignity.

I have already said there are high governmental reasons why the precedent now to be established should be a good one; that if the law is in doubt, you have the power to remove that doubt by legislation. The courts have no power to do so, because it has not been before them. If the theory of your honorable committee is wrong, conscientious judges who differ from them will repeat the error, regardless of your action. Thus then they will stand, with the terror of legislative precedent suspended over them upon the one side, but with a more awful terror, that of Almighty vengeance, if they violate their consciences, upon the other. Call you, sir, such a position as this, that of an independent Judiciary? Sir, with all respect, this would be solemn mockery.

One word more, Mr. Speaker. Your committee inform

you that they have based their resolutions upon Parliamentary law, and have given you its antiquity and its evidence of wisdom. They have assumed that this law of privilege is uniform. I have demonstrated by the statutes and constitutions that it is not, and that their conclusions in this particular were in error. I have shown that the National Legislature have their privileges secured by the National Constitution; that some of the independent States have their law of privilege secured by constitutions, and some by statutes; that the law of privilege of this State is qualified and limited by the statute, and differs from that of the Nation, of other States, and of Great Britain. If this honorable committee, as I insist, have been led into unintentional error in this; if they are equally in error as to the law of privilege in Great Britain, may not the resolutions based upon such opinions be also error? Can you rely upon such a mistaken view of the law as a safe basis of action?

Sir, I have read the cases referred to in that report upon the English law of privilege, and what will be found as most remarkable, is the fact that not one of those cases was determined within the last century, nor since the year 1700. If that learned committee had extended their research to that year, which was the thirteenth year of the reign of William III, they would have found an English statute *limiting* the privileges of members of Parliament, which is entitled, "An act for preventing any inconveniences that may happen by privilege of Parliament." In that act, sir, the privilege was so limited that members of Parliament, including peers of the realm, were made liable to the service of any *civil* process which did not arrest their persons; and service of such process upon them was not void, as your honorable committee say of the subpœna, and as has lately been held in the case cited in the State of Maryland.

If that learned committee had extended their research still further, down to the year 1770, just one hundred

years ago, to the thirteenth year of the reign of George III, they would have found another statute, still further abridging the privileges of members of Parliament; setting forth in its preamble that it was to obviate the inconvenience and delay, by reason of *privilege*, to the king and his subjects in prosecuting their suits, &c. What suits had the king but suits in his name, which in this country are suits in the name and in behalf of the people?

In fact, sir, for the *last one hundred years*, the privilege of Parliament has not been such as your honorable committee report it to be, but has been, as it has been here, limited and restricted by statute, and confied to arrest *in civil cases;* and the English law of privilege now is not materially different from that of the State of New York. Your learned committee have as much mistaken the law of privilege of Great Britain as they have the law of privilege of the State of New York.

When this last bill to limit privilege was before Parliament, that great light of English jurisprudence, Lord Mansfield, advocated its passage, and I quote the following most significant remarks from his speech, which may be regarded as judicial construction of that law. He says: "It may not be popular to take away any of the privileges of Parliament, for I very well remember, and many of your lordships may remember, that not long ago the popular cry was for an extension of privileges, and so far did they carry it at that time, that it was said that privilege protected members from *criminal actions;* and such was the power of popular prejudice *over weak minds*, that the very decisions of some of the courts were tinctured with that doctrine. * * * It was, he said, undoubtedly an abominable doctrine. The laws of this country allow no *place* or *employment* as a sanctuary for crime, *and where I have the honor to sit as judge, neither royal favor nor popular applause shall ever protect the guilty.*" * * Noble patriot! In another part of his speech, he said, "that members of both Houses should be free in their persons *in cases of civil*

suits, for there may come a time when the safety and welfare of this whole empire may depend upon their attendance in Parliament. God forbid that I should advise any measure that would in future endanger the State. But this bill has no such tendency. It expressly secures the persons of members from arrest *in all civil suits.* I am sure were the noble lords as well acquainted as I am with but half the difficulties and delays that are every day occasioned in the courts of justice under pretense of privilege, they would not, they could not, oppose this bill." The bill, sir, passed; and for one hundred years that has been and is the law of privilege in Great Britain, and is *not* now as your honorable committee have reported it to be.

No case can be found like those cited by your honorable committee since the passage of that bill, even in the English courts. The cases cited by your honorable committee are before that time, and as that noble man declared, *they contained a tincture of that abominable doctrine.*

Mr. Speaker, have I not shown errors enough in the basis upon which your honorable committee have proposed action, to show that the law of privilege is not, in this State, what is claimed for it? There is not now even an approach to it, as laid down by your committee, in England. Why, sir, ten years before the passage of this last English statute, Lord Preston, a peer of the realm, was committed by an inferior court of that realm, a court of quarter sessions, for refusing to give evidence before a grand jury on an indictment for high treason. He obtained a habeas corpus before a higher court, the King's Bench, for his discharge; when Holt, Lord Chief Justice, said "he had committed a great contempt, and had I been there I would have fined him, and committed him till he paid the fine."

But, sir, I have done with English authority.

Now, sir, it only remains to give construction to the words *civil process* in our statute. If an attachment issuing out of a criminal court is *civil process*, then have I

been misled by books of authority; then have I mistakenly erred in deciding the law. If it is not *civil process*, then my decision is law, and must stand approved by the courts, whatever this House may do. Oh! the peril to an independent Judiciary! Would to God, that a Marshall, or a Kent, or a Mansfield, had the decision of this great question! That is, if they would stop one moment to entertain such question. But, sir, I am not called upon to establish that the subpœna issued by the district-attorney was *criminal process;* that burthen is *not* legally put on me. No lawyer will say it was *civil process.* I did not issue that; the statute makes it the duty of the district-attorney to do that; and yet, in theory, it issues out of the Court of Oyer and Terminer; and disobedience to its commands is regarded as contempt of that court. But the question is not that. If regularly issued, its service was good, and not void. It was, in the eye of the law, a contempt to disobey it. And all the question that remains is, if this honorable body have the power, and could entertain it at all, was the process issued upon that contempt a *civil process?* This honorable body is called upon to vote distinctly upon the meaning of those words. I am not unwilling to see that record of names; I have no indisposition to see the lawyers of this House put their names to such a record. If, with the light of intelligence of this day—if with a sacred regard for judicial independence—if with a patriotic desire to avoid conflicts between the coördinate and coextensive departments of the sovereign power—if you shall act with freedom from all spirit of wounded dignity—if with jealous care you feel that you are sitting both as accusers and judges, and that the sovereign people will hold you responsible for your action—if you shall place yourselves upon that lofty plane of devotion to the Constitution and the best interests of this noble State—if it shall be your just pride to guard and protect the rights of an independent judiciary from the terrors of aggression of a coördinate power; then, sir, I have no fears of the result.

I invoke these noble and elevating considerations to your honorable body. But, Mr. Speaker, I desire to say again, that my appearing here to-day is out of respect to this high department of the government—not waiving my right to protest against being brought here at all. Nay, sir, by the advice of my counsel I should not have appeared here at all, and should have put in defiance the power of this body—should have allowed your officer to execute the process of this House upon my person, and held you responsible for the act. But my own judgment has dictated to me to come here out of courtesy—without waiving my right of protest, or acknowledging myself in your custody. Although I have appeared here and offered this defense, I do not say that I submit this case to you, though probably that will be the effect of your action; but, sir, I stand here *protesting*, earnestly *protesting*, that I am not here in obedience to your power, but here out of courtesy to an independent department of this government.

At the close of this argument, Mr. Fields made a motion that Judge Potter now withdraw from the House until his case be disposed of.

The Speaker then informed the honorable judge that he could now withdraw to the library room until his case was decided.

Judge Potter—I prefer to stay, and unless driven from the House by its power, shall remain.

The Speaker—The request of the honorable judge will be granted.

Judge Potter—I have made no request—and took his seat.

A long and exciting debate followed.

Mr. Fields offered the following resolution:

Resolved, That the Hon. Platt Potter, in issuing the attachment for the arrest of Hon. Henry Ray, a Member of Assembly from the First District of the County of Ontario, was guilty of a high breach of the privileges of this House, and censurable therefor; and that he be reprimanded by the Speaker, in the presence of this House.

This resolution received no support, and was withdrawn.

Mr. Alvord offered the following amendment to Mr. Fields' resolution:

Resolved, That the Hon. Platt Potter was mistaken as to the privileges of this House, in the action taken by him in the arrest of Hon. Henry Ray, and did commit a breach of its privileges in so doing; but this House do not believe that any intention or desire to interfere with the independence or dignity of the House actuated him in the performance of that which he deemed his official duty.

Mr. D. W. Murphy offered the following as a substitute:

Resolved, That the Hon. Platt Potter, a Justice of the Supreme Court of this State, be discharged from the custody of this House until the hour of twelve o'clock on the first day of March, and that in the meantime the opinion of the Attorney-General be communicated to this House, as to the construction of the term "civil process," in the statute exempting members of the Legislature from arrest. Lost.

The question was then taken upon the resolution of Mr. Alvord, and was adopted by a vote of 92 to 15, and the case was discharged.

On the 14th day of February, 1870, W. B. French had served upon him, by the Sergeant-at-Arms of the Assembly, the following notice and resolutions:

State of New York—In Assembly.
Albany, February 11, 1870.

W. B. French: Sir—This day the Assembly of the State of New York passed the following resolutions:

Resolved, That Winsor B. French, District-Attorney of the county of Saratoga, be summoned and required to appear before the bar of this House, the House then to take such action as shall seem meet to this House for the high breach of its privilege by said French in issuing or causing the issuing of the attachment on which the Hon. Henry Ray was arrested and forcibly conducted to Ballston Spa, Saratoga county, in this State.

Resolved, That W. B. French, residing in Saratoga Springs, in the State of New York, be and he is hereby ordered to attend at the bar of this House, on the sixteenth day of February, inst., at 12 o'clock M., at which time he will have opportunity to make explanation of his conduct in causing the issue of

an attachment for the arrest of Hon. Henry Ray, a member of this House; and this Assembly will then proceed to take further order on the subject; and a copy of this and the foregoing resolution under the authentication of the Clerk of the Assembly of the State of New York, and attested as a true copy by Jeriah G. Rhoads, Sergeant-at-Arms for the said Assembly, and left by the said Sergeant with the said W. B. French, or at his residence in the village of Saratoga Springs, on or before the fourteenth day of February, inst., shall be deemed sufficient notice to the said French to attend in obedience to this resolution.

By order of the Assembly.

C. W. ARMSTRONG, Clerk.

In pursuance of the above notice and resolutions, Mr. French appeared at the bar of the Assembly, on the day appointed, and presented the following argument and defense:

Mr. Speaker: Pursuant to the order just read, I appear to make explanation of my conduct concerning the issuing of an attachment for the arrest of the Hon. Henry Ray, a member of this House, and for the purpose of such explanation, I ask the attention of the House to a brief statement of the facts of the case, and upon such facts, my understanding of the duties of my office, and the law by which I was and ought in such cases to be guided.

On the 17th day of January, 1870, a Court of Oyer and Terminer and general jail delivery was duly held at the court house, in the village of Ballston Spa, in and for the county of Saratoga. The Hon. Platt Potter, one of the justices of the Supreme Court; George Washburn and David Maxwell, justices of the peace for sessions in and for said county of Saratoga, constituting said court.

A grand jury having been duly drawn and summoned, was then and there empanneled and sworn, and by the said Justice Potter in the usual manner charged to inquire for the people of the State of New York, of and concerning all crimes and misdemeanors and offenses against the said people, committed within the county. In pursuance of my duty as district-attorney, in and for the said county, I attended before the grand jury at their request, and pre-

sented, among others, the complaint of David H. Biddell, a farmer residing in the town of Charlton, in said county, against one Charles Wilson, for obtaining his signature to promissory notes by false pretenses, on the sale to him of an alleged patent right.

Mr. Biddell, on being sworn, testified in substance, among other things, before the said grand jury, that Charles Wilson, on or about the 15th day of November, 1867, came to his house in Charlton and represented himself to be the agent of Henry Ray, who owned a patent for the making and vending of "Spoor's Patent Gate;" that he had the sole agency for, and was empowered as such agent to sell, the said patent right in and for the counties of Saratoga, Warren, Essex, Rensselaer, Dutchess, Putnam, Westchester, Rockland, Suffolk, Orange, Sullivan, Ulster and Queens; and that believing the said representations of the said Wilson to be true, he purchased the right to sell the said patent in the said counties, and gave his notes to the said Wilson therefor, to the amount of seven hundred dollars, a part of which he had paid; that he never had seen the said Wilson since, but soon discovered that he had been swindled; that he had called upon Mr. Ray in regard to the matter, who denied that Wilson was his agent or authorized to sell the right of said counties, except Saratoga, and who refused to give him any aid or assistance in the matter. After hearing which testimony the grand jury desired the testimony of the said Henry Ray, and directed that he be subpœnaed for that purpose. I accordingly issued a subpœna in the usual form, and handed the same to an officer to serve, who subsequently informed me that he had made the service and that Mr. Ray would be up the next day, but did not inform me or return upon the original subpœna that Mr. Ray declined to obey the subpœna, or that he claimed any privilege as a member of the Assembly or otherwise.

Mr. Ray did not obey the subpœna as therein required, nor assign any reason therefor, to me or any one else, to

my knowledge; and after waiting nearly two days, I made known the fact to the grand jury, and was by them instructed to issue an attachment and bring up Mr. Ray to testify as a witness, in obedience to the subpœna which they had previously ordered. Whereupon I caused Mr. Ray to be called in open court, produced the return of the due service of the subpœna, which was in the usual form, had his default entered, and asked the court for an order directing the issue of an attachment against the said Henry Ray, which order was granted. An attachment was duly issued, duly and properly attested by the court, and handed to Mr. Benedict, one of the deputies of the sheriff of said county, to execute. On the following day Mr. Ray appeared in the court room and signified his willingness to testify before the grand jury, and did, in substance, among other things, testify that he had been a manufacturer of paper, and also been to quite an extent, and was then engaged in speculating, buying and selling patent rights, and dickering in various ways; that he was one of a company of four who owned the patent right called "Spoor's Patent Gate;" that Charles Wilson was not an agent of him, (the said Ray,) nor of the said company; nor had he any authority to sell the patent right in and for the counties aforesaid, except the county of Saratoga. Mr. Ray was then excused by the foreman of the grand jury, returned into the court room and was discharged without further proceedings being had upon the said attachment. And I may add that Mr. Ray did *not*, to my knowledge, on his arrival in custody of the officer, or at any other time, demand to be taken before the court to plead his privilege as a member of the Assembly, and his exemption from arrest under such process. Nor did I refuse him any such request, nor cause him to be taken immediately before the grand jury, as is alleged in the report of your honorable committee.

From the foregoing statement of facts, it will be seen that the decision and action sought to be reviewed by the

honorable the Assembly on this occasion, was made and occurred in a proceeding instituted and pending in and before the Court of Oyer and Terminer and general jail delivery of the State of New York, held in and for the county of Saratoga, at its recent January term, to enforce the criminal laws of the State, and that the court is one having full and entire jurisdiction over proceedings in criminal cases, *but has no civil jurisdiction whatever.*

And to be entirely accurate it should also be added that the case before the grand jury was one where the evidence was such as absolutely to require the testimony of the Hon. Henry Ray, a member of the Assembly, either to contradict Wilson, the accused person, who assumed to be his (Ray's) agent in the commission of the crime charged, or by refusing to obey the subpœna and attending and testifying as therein required, leave it to be inferred that Wilson was in fact his agent, and that he (Ray) was himself *particeps criminis* in the alleged offense with Wilson.

It is upon such a case as this, where it would seem that the honor and dignity of the Assembly, as well as of the member himself, absolutely required that the member should attend and exculpate himself, and thereby fix the offense upon the proper party, that the question has been made as to whether the Court of Oyer and Terminer had a legal right under the circumstances:

1st. To issue a subpœna requiring the attendance of Mr. Ray before the grand jury to testify in the matter then pending before them.

2d. And when he failed to appear pursuant to the command of such subpœna, whether that court had a right to issue an attachment and compel his attendance and evidence before that body; or was the Hon. Henry Ray, being a member of Assembly, as such, privileged from arrest on such attachment?

I propose to examine these questions, in their order, briefly, and so far forth only as to explain, not only the

views entertained by me of them, but also my action in the premises, which action, as I understand, is sought to be impugned here.

There can certainly be no serious question as to the authority of the court or district-attorney to issue a subpœna requiring the attendance of Mr. Ray before the grand jury.

The statute, which was enacted by the joint act of the Senate and Assembly, expressly gives that power to the court. It provides as follows:

"§ 1. The several courts treated of in the first chapter of this act, are courts of record, and in addition to the powers which are or may be conferred on them respectively, they shall have power,

1. To issue *process of subpœna* requiring the attendance of *any* witnesses residing or being in any part of this State, to testify in any matter or cause pending in such court." (2 *R. S.* 276.)

Now the Court of Oyer and Terminer is one of those mentioned in chapter one, specified in the above quoted section. (2 *R. S.* 201, 205.)

It will be seen therefore that by the above quoted provision of the statute a subpœna is declared to be *process*, and the court is thereby expressly authorized to issue it, "*requiring the attendance of any witness residing* or being in any part of the State, to testify in any matter or cause pending in such court. There is no exception made; a subpœna may be issued for any witness, *privileged* or not, according to this statute. A witness, even if *privileged* and not compellable to attend, if duly subpœnaed, may yet waive his *privilege* and attend and testify, and whether he will waive his privilege, cannot be known to the court or officer at the time of issuing it. Moreover how is the court to *know* judicially whether the witness wanted is a member of Assembly or not?

Besides, this precise question, as to the propriety of issuing the subpœna in such a case, was long since decided in

conformity to the above views, by the Circuit Court of the United States, in regard to members of Congress. In such case, even if *privileged*, Judge Chase held that the proper method was to issue the subpœna and have it served, and if the members claimed their privilege of exemption, another question might then arise. (*U. S.* v. *Cooper*, 4 *Dallas*, 341.)

This statute and the decision in the case cited, and the apparent good sense of the view itself, would seem to be conclusive on this point; namely, that the *subpœna* was not "void" because the witness whose presence and testimony it was issued to secure was *privileged* from attending, in case he asserted his privilege. And certainly the court and the district-attorney should be allowed to presume, that in *such* a case as the one before the grand jury, out of which these questions have arisen, if ever, the member of Assembly himself, whose evidence was wanted, would be the very last person, and the Assembly, of which he was a member, the last body to insist on his privilege, if such existed, to prevent or excuse his attending the court and giving his evidence. At any rate the view I entertain on this point is, that it was both the right and duty of the court to issue the subpœna.

But again, it is made the duty of the district-attorney to attend upon the grand jury when required, to give them advice, "*and to issue subpœnas and other process to bring up witnesses.*" (2 *R. S.* 725, § 32.)

And if the district-attorney failed to perform his duty in this respect, he would himself be guilty of a misdemeanor, and liable to indictment. (2 *R. S.* 696, § 38.)

So that the subpœna was issued in pursuance of the statute law of the State itself, binding as well on the Assembly, whose act it is, in part, as on the courts; and as already shown, was not itself a violation of the privilege of Mr. Ray, although he was a member of Assembly. To illustrate still further, suppose that the session of the court, to attend which a member of Assembly is subpœnaed, is

not to be held until after the adjournment of the Legislature, would the *subpœna* be "void," even if served on a member in such a case? Certainly not. There is no law or privilege it would violate. And this shows that a subpœna, so issued, is not "void," whether the person served is privileged from attending or not.

Second. Was the issuing of the attachment authorized? Or was the Hon. Henry Ray privileged from arrest, under and by virtue thereof, in consequence of his being a member of Assembly?

I answer unhesitatingly that in my judgment the issuing of the attachment was authorized, and that the Hon. Henry Ray was not privileged from arrest under and by virtue thereof.

Passing by all questions relating to the immunity of the district-attorney and the judge in the performance of duties judicial in character, I come directly to the main question involved in this investigation, namely: Are members of the Legislature privileged from arrest on an attachment issued to compel their attendance in a criminal case before the grand jury? If this question is answered in the negative, of course all further doubt as to the regularity or the legality of the issuing of the subpœna, or the attachment, or the service thereof, is at an end. The proper solution of this question depends upon the construction of certain provisions of our State constitution and the laws passed under it.

It is conceded that in England the privileges of members of Parliament are not defined by any written law; that they are vague and indefinite, and arbitrarily enforced, "the doctrine being that their dignity and independence are preserved by keeping their privileges indefinite, and that the maxims upon which they proceed, together with the method of proceeding, rest entirely in their own breast, and are not defined and ascertained by any particular stated laws."

But the American doctrine is far otherwise. Jefferson,

in his Manual of Parliamentary Practice, from which the above cited extract is taken, observes in reference to the United States Constitution: "It was probably from this view of the overreaching character of privilege that the framers of our constitution, in their care to provide that the law shall bind equally on all, *and especially that those who make them shall not exempt themselves from their operation*, have only privileged senators and representatives themselves from the single act of arrest in all cases except treason, felony and breach of the peace," &c. (*Jefferson's Manual, p.* 53.)

The foregoing remarks equally apply to our own State. In the constitution of 1846 it is provided that "For any speech or debate in either house of the Legislature, the members shall not be questioned in any other place." (*Art.* 3, § 12.)

Now by adopting this provision, the people abrogated all other privileges of members of the Legislature, except those only which were preserved under article 1, section 17, which provided "that such acts of the Legislature of this State as are now in force shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same." (*Constitution, art.* 1, § 17.)

By force of this latter constitutional provision that part of the Revised Statutes entitled "On the Powers, Duties and Privileges of the two Houses and their Members and Officers," became constitutionalized, so to speak, and the same, not having since been in any respect altered, is now the law of the State, and furnishes the only guide for ascertaining and determining the privileges of members of the legislature to exemption from service of process. Section 6 is the provision applicable to the present subject, and is as follows:

"§ 6. Every member of the legislature shall be privileged from *arrest, on civil process*, during his attendance at the session of the House to which shall belong, except on

process issued in any suit brought against him for any forfeiture, misdemeanor or breach of trust in any office or place of public trust held by him." (1 *R. S.* 154, § 6.)

To give a construction to the provisions of this statute, it is neither necessary nor useful, nor in fact allowable, to resort to precedents in the law or practice of the Parliament of Great Britain. And on this subject the remarks of Chief Justice Parsons, in a similar case, arising in Massachusetts, are entirely apposite. He says: "To introduce examples from the British House of Commons, cannot much illustrate the subject. The privileges of that House are not derived from any written constitution, but have been acquired by the successful struggles of centuries, directed either against the monarchy or an hereditary aristocracy. The exertions of the Commons have generally been popular, because the people were supposed to reap the fruits of them. In this State we have a written constitution formed by the people, in which they have defined not only the powers but the *privileges* of the House, either by express words or by necessary implication. A struggle for privileges in this State would be a contest against the people, to wrest from them what they have not chosen to grant. And it may be added that the grant of privileges is a restraint on the rights of private citizens which cannot be further restrained but by some constitutional law." (*Coffin* v. *Coffin*, 4 *Mass. Rep.* 33.)

The simple question to be decided then is, what does the statute mean to include in the term "*civil process*," on which the member is privileged from arrest? It seems quite obvious to me that these words were designed to apply to all process issued in civil actions between citizens, to enforce civil remedies, as contra-distinguished from *process* of any and every kind which issues from courts of criminal jurisdiction only, on behalf of the people, to enforce the criminal laws of the State and for the punishment of public offenses.

The definition of the word *process*, as given in the books,

corroborates this view. By Burrill the word *process* is defined as being "the *entire* proceedings in any action or prosecution, real or personal, *civil* or *criminal, from the beginning to the end.*" (*Burrill's Law Dict. title* "*Process.*")

So, too, Cowen, in *The People* v. *Nevins*, (1 *Hill*, 169,) in reference to whether an order of commitment for contempt was process, says: "But it is supposed that the word *process* necessarily means a *writ* or *warrant*, and implies that there cannot be any imprisonment without it. I admit that the word process usually signifies a writ or warrant, but it also means a good deal more. *It means all the proceedings in a cause after the first step.*" And he also cites *Tomlin's Dict. title* "*Process.*" Also, see *Webster's Dict. Unabridged, title* "*Process.*" Now were the issuing of the subpœna, and the attachment for Mr. Ray, proceedings in the case against Wilson before the grand jury, after its commencement? If so, they were but different processes issued in that case, according to the above definitions, and this but accords with the statute itself, already cited, which expressly declares that a subpœna is process. (2 *R. S.* 287, § 1, *subd.* 1.) That such subpœna and attachment must be deemed to have issued *after the commencement* of the proceedings against Wilson is clearly shown, too, in *The People* v. *Hackley*, (24 *N. Y. Rep.* 79.) The question there was whether the refusal of Hackley to testify before the *grand jury*, was a refusal to testify in a proceeding *on an* indictment. The court held that it was; Denio, J., who gave the opinion, saying: "The criticism of the appellant's counsel is, that the examination of a witness before a grand jury is not a proceeding upon an indictment, and so not within the statute. In one sense it is not, but by the theory of proceedings in criminal cases the indictment is supposed to be prepared and taken before the grand jury by the counsel prosecuting for the State; and the evidence is there given in respect to the offense charged in it. If the party accused appears to be guilty the indictment is certified to be a true bill, otherwise it is

thrown out. In that view of the practice, all which takes place before the grand jury, as well as the subsequent steps, may be said to be proceedings upon the indictment."

It being settled, therefore, that both the subpœna and attachment were *process*, issued in a legal proceeding, after its commencement, the question arises, was it *civil* process? Upon this point it seems to me the definition is equally clear; the process was *criminal* as distinguished from *civil.*

By the Code of Procedure, criminal and civil actions are defined as follows:

§ 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress of a wrong, *or the punishment of a public offense.*

§ 3. Every other remedy is a special proceeding.

§ 4. Actions are of two kinds.

1. Civil.
2. Criminal.

§ 5. A criminal action is prosecuted by the people of the State as a party against a party charged with a public offense, for the punishment thereof.

§ 6. Every other is a civil action.

According to the definitions above given, the proceeding pending against Wilson in the Court of Oyer and Terminer, before the grand jury, was a "*criminal* action prosecuted by the people of the State, as a party, against a party charged with a public offense, for the punishment thereof."

The same definition, in substance, is given by Burrill, of a *civil* action. He says it is "an action brought to recover some civil right, or to obtain redress for some wrong, *not being a crime or misdemeanor.* In this latter respect it is distinguished from a criminal action or prosecution." (*Burrill's Law Dict.*, "*Civil Action.*")

And the same author defines "civil right" to be "the right of a citizen; the right of an individual as a citizen; a right due from one citizen to another, the privation of

which is a civil injury, for which redress may be sought in a *civil action.* (*Burrill's Law Dict., title "Civil Rights."*)

And the word "civil" is defined to be something "belonging or relating to, or affecting a person as a *citizen*, relating to, or affecting the rights and duties of a *citizen*, particularly as between one citizen and another." (*Burrill's Law Dict., title "Civil."*)

From all these authorities it conclusively appears to my mind that "*civil process*" must necessarily, *ex vi termini*, include only such process, as one citizen is by the law entitled to have issued by the courts, in a civil action, to enforce or aid in enforcing some civil right in his favor against another citizen or party; and that criminal process, on the other hand, is such as issues on behalf of the people, as a party, in a criminal action, to enforce or aid in enforcing the *criminal* law against an offender, and for the punishment of a public offense. And the proposition that a court of *criminal* jurisdiction, which has no *civil* jurisdiction whatever, can issue *civil* process, is a logical impossibility, as well as a legal absurdity. Nor so far as the definition of the term "*civil process*" is concerned, are we without authority from our highest court. In *The People* v. *Campbell*, (40 *N. Y. Rep.* 137,) the Court of Appeals, Mason, Justice, giving the opinion, said: "It has never been questioned but such a process as this, to enforce a *civil* remedy, by the collection of a specified sum of money, is to be regarded as *civil process.*"

Neither are we without authority as to what constitutes "*criminal process.*" In *Spalding* v. *The People*, (7 *Hill*, 303,) Nelson, Ch. J., speaking of criminal contempts, and amongst others, of the refusal of a witness to attend or be sworn, as Ray did here, said, "all these are strictly cases of *criminal contempts*, which have nothing to do with the collection of debts, or *the enforcement of civil remedies*, beyond the support and vindication of the general administration of the laws."

Tested, therefore, by these rules, there can be no ques-

tion but that both the subpœna and the attachment in this case were properly issued, and that Mr. Ray was not privileged from yielding obedience to both; and that failing to obey the command of the subpœna, he was liable to arrest under the attachment.

But the argument to show that the attachment in this case was not "*civil process*" does not end here. If it be conceded in the case, as it is not, that the Court of Oyer and Terminer, whose jurisdiction is *exclusively criminal*, and which has no civil jurisdiction whatever, can yet issue a *civil process*, and that the subpœna served on Mr. Ray to appear before the grand jury, was such "*civil process*," still the statute does not "*privilege*" him from such service. A member of Assembly is only exempted from "*arrest*" or "*civil process*," and not from its service where it may be served without an *arrest* being made. Not being *privileged* from the service of the subpœna, therefore, the statute imposed the duty on him to obey its mandate. And by refusing to obey, he was guilty of a criminal offense—a misdemeanor—for which he was liable to prosecution in two ways; one by indictment, and the other by the issuing of an attachment, as in this case. (2 *R. S.* 277, § 10, *sub.* 3. *Id.* 692, § 14.)

And the process in either case, whether he was proceeded against by indictment or by attachment, would be process issued to enforce the criminal law, and to punish the delinquent for the commission of a public offense. It seems to me, therefore, that in this view, the attachment issued against Mr. Ray, and on which he was arrested, was clearly *criminal process*, in the strictest sense of that term, and consequently, that under that statute he was not privileged from arrest thereon.

If, in answer to this argument, it be suggested that the subpœna was but a "*civil process*," and that the *attachment* so issued by the court was not *criminal process*, because issued in consequence of the omission of Ray to perform but a *civil duty* enjoined upon him by such civil process,

and that a crime cannot be deemed to grow up out of, or be predicated upon such a mere breach of civil duty, I reply, 1st. That, as already shown, it is a vital error lying at the foundation of this position, to assume that the process of subpœna, issued by a criminal court, in a criminal action, to enforce the criminal law, can be deemed *civil process* at all. 2d. But if it be *civil process*, that circumstance constitutes no reason why a refusal to obey it does not violate a civil duty, and also become a criminal act, which subjects the offender to punishment, even though he happens to be a member of the Legislature. Indeed, such is the case, generally, with all crimes, and especially is it the case with the crimes of murder, arson and assault and battery, and the like. In all these and similar cases the crime primarily consists in the violation of the *civil right* of some citizen; of the right to life, liberty, security or property, and it may also be added that the criminal law is made chiefly for the very purpose of preserving and protecting these civil rights of the citizen. Blackstone, in defining and explaining the nature of crimes, says: "In all such cases, the crime includes an *injury;* every public offense is also a *private wrong* and somewhat more; it affects the *individual*, and it likewise affects the community." (3 *Black. Com.* 5.)

It wil be seen, therefore, that the assumption that the act of Ray in neglecting to obey the subpœna, cannot be regarded as *criminal*, because the subpœna itself was but a *civil process* and enjoined but a *civil duty*, is absurd. The principle, if carried out to its logical and ultimate consequences, would wholly nullify the statute which prescribes the privileges of the members of the Legislature. To effectuate such intent, the statute should be amended so as to read as follows:

"Every member of the Legislature shall be privileged from arrest on *civil process;* and also on all *criminal process*, issued to enforce the performance, or to punish the violation of a *civil duty*."

So amended, the statute will indeed attain the end desired. But it will do more. It will then *privilege* members of the Legislature from arrest, not only on all *civil process*, but also on all *criminal process* as well. To such absurdity will such a construction lead. It is needless to say, that as it now stands, the statute is susceptible of no such construction.

I have chosen thus far to argue the question involved in the construction of this statute without any reference to considerations of policy on the part of the State, or of inconvenience which may or may not result to the State in consequence of the absence of a member of Assembly from serving the people in the House, for a short period, while obeying the mandate of the same people and serving them elsewhere in another capacity. For I claim that if it was clearly shown, that by thus obeying a subpœna the State would be seriously inconvenienced by the enforced absence of the member from his place in the House, yet that circumstance cannot be allowed to modify, in the least degree, the plain and unambiguous language of the statute.

But if we enter upon the argument of policy and convenience, the case is equally strong in favor of the construction for which I contend. It is of vastly more consequence that a single member should be compelled to attend the criminal court, if necessary to the proper enforcement of the criminal laws of the State, or the punishment of a public offender, than that the offender should go unpunished by reason of the failure of a member to attend the court as a witness. Besides, if the statute is so construed as to privilege Mr. Ray from attending in this case before the grand jury as a witness, then it applies to all offenses, and would privilege him and every other member from attending, even in the case of murder or treason, or other capital offense. Now if the Legislature thought it expedient to make Mr. Ray liable to arrest in case he was himself the party charged with a criminal

offense, in order that the enforcement of the criminal law should not be obstructed by the interposition of a plea of privilege, can it be presumed that they intended the same plea could be interposed to obstruct the course of public justice in the case of a similar charge against Wilson? It is preposterous, in my judgment. No reason can be assigned for a difference in the two cases. In both the public are the prosecutors, and the injury to the public would be the same by allowing the plea in the one case as in the other. To allow a plea of privilege to obstruct or defeat the indictment or the conviction of Wilson, would be as great an injury to the public as to allow the same privilege to excuse or delay the prosecution of Ray himself, and no more. Moreover, it should not be forgotten that the statute in question, which prescribes the *privileges* of members of the Legislature, was passed at a time when imprisonment for debt was tolerated by the law of this State, and a member of the Legislature, without such *privilege*, was liable, equally with any other citizen, to be arrested on process issued in *civil actions* for debt; and it is quite manifest that the statute was enacted to *privilege* members from *arrest* only in such cases. In the light of this fact, the reason is obvious why the Legislature, in the language employed in this statute, should and did recognize the broad distinction, hereinbefore mentioned, existing in the law, between the two great families into which actions are divided, namely, *civil and criminal;* and while leaving a member liable to "*arrest*" on *all process* issued in *all criminal actions and proceedings;* and also "on process issued in any suit brought against him for any forfeiture, misdemeanor or breach of trust in any office or place of public trust held by him," (which includes civil actions for acts which are crimes, or which resemble them,) only *privileges* him from *arrest* on *process* issued in other civil actions than those mentioned. Hence, whether we look at the language of the law itself, or whether we regard the presumed intent of its makers or its policy, in

either case we are brought to the same conclusion, namely: that Mr. Ray was not privileged in this case from the service of the subpœna, or arrest under the attachment subsequently issued.

But, as already shown, the question is simply one of legal construction of the language of the statute, which cannot be changed but by amendment. If it be true that the law as it stands is not as broad in its grant of priviloges to members of the Legislature as public policy and the good of the State require, let it be amended, but let it not be perverted from its plain meaning to convict the officers of the law, who have honestly and fairly carried it out, of being themselves guilty of its violation. But if any of the officers of the law are in the least censurable in the arrest of Mr. Ray, on the ground assumed, I trust I may be permitted to say that it seems to me that Mr. Benedict, acting only as a ministerial officer in the discharge of a duty prescribed by the process which he was directed to execute, and which process is usually deemed an entire protection to the officer, should not in the least degree be regarded as culpable. It is, I trust, needless for me to say that so far as I am concerned, it is entirely a matter of indifference, personally, as to how the law is construed to be, my only object having been merely to discharge my duty under it as a public officer, and my action hitherto under the law has been taken, not with any view of treating this honorable House with the slightest disrespect, but only to perform a duty cast upon me by the statute, in the only manner that duty could be performed, and if in so doing, it shall be adjudged by this House that I have violated the law in any respect, then with all due respect to this body, I insist that I am only amenable to punishment by indictment, or to trial and removal on charges by the Governor.

At the close of the above argument, the same resolutions were adopted as in the case of Judge Potter.

INDEX.

A

BILLS OF EXCHANGE.

BILL OF LADING.

BRIDGE.

BROKERS.

CORPORATION.

COSTS.

CRIMINAL LAW.

1. *Accomplices.*

D

DAMAGES.

DEBTOR AND CREDITOR.

DECEIT.

DEDICATION.

DISTRICT COURTS OF NEW YORK.

DIVORCE.

DONATIO MORTIS CAUSA.

EXCISE LAW.

EXECUTION.

EXECUTORS.

EXEMPTION LAW.

INSURANCE (FIRE.)

INTERPLEADER.

MARRIAGE.

O

OFFICER.

PROMISSORY NOTES.

R

RAILROADS.

RAILROAD COMPANIES.

RECEIPT.

See CONSIGNEE, 3, 4.

RECEIVER.

REFEREE.

RELEASE.

TROY UNION RAILROAD COMPANY.

See RAILROAD COMPANIES.

V

VENDOR AND PURCHASER.

W

WILL.

WITNESS.

END OF VOLUME FIFTY-FIVE.

J. Ep. F. T. O.